

Applicant Details

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Applicant Education

BA/BS From	University of Maryland-College Park
Date of BA/BS	May 2017
JD/LLB From	New York University School of Law https://www.law.nyu.edu
Date of JD/LLB	May 23, 2020
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	NYU Journal of Law and Business
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Zenin, Serge
serge@intrellit.com
Ferrari, Franco
franco.ferrari@nyu.edu
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Wieder, Howard
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References

Wieder, Howard
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Zenin, Serge
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(917) 567-0131

Rafael Declet
radeklet@nycourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

311 East 90th Street
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adalnathan@gmail.com

June 16, 2023

Dear Honorable P. Casey Pitts:

I am writing to apply for the August 2023-2024 term law clerk position in your chambers. I believe that my strong research and writing skills, combined with my practical legal experience as a judicial clerk, will be a welcome contribution to your courtroom.

The scope of my work experience demonstrates not only industriousness but also an ability to adapt to various high-paced legal environments. As a judicial clerk working in the Appellate Division, First Department, I learned under Justice González's close supervision. For her chambers, I drafted motion reports, orders, and prepared memorandum on appeals to assist her when she presided on the panel.

My law school experience also reflects my skill in case management and considerable interest in litigation. During my time at NYU, I served as a staff editor for the *Journal of Law & Business*. I also participated in the Racial Justice Clinic, an externship with the ACLU's Criminal Law Reform Project, and the Global Justice Clinic, an international humanitarian focused law clinic located within NYU's campus.

I would appreciate the opportunity to meet with you to discuss my qualifications in greater detail. Should you require any additional information or materials to assist you in assessing my candidacy, please do not hesitate to contact me. Thank you for your time.

Sincerely,

Nathan Adal

NATHAN ADAL

311 East 90th Street | New York, New York 10128
(301) 717-4231 | adalnathan@gmail.com

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York

J.D., May 2020

Awards: Leonard M. Weintraub Merit Scholarship (*partial tuition merit-based scholarship*)

Honors: *NYU Journal of Law & Business*, Staff Editor/Notes Committee

Activities: Africa Law Association, Vice President/Treasurer
Black Allied Law Students Association, Member

UNIVERSITY OF MARYLAND, COLLEGE PARK, College Park, Maryland

B.A. in Government & Politics and English, May 2017

Honors: Dean's List, 2013-2017

Activities: College Success Scholars, Member
Ethiopian Student Association, Member
College Park Scholars, International Studies Citation

Study Abroad: University College London Union, London, England, Fall 2015

EXPERIENCE

NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, New York, New York

Assistant Law Clerk for the Honorable Lizabeth González August 2021 - Present

Broad case load including commercial, civil, criminal, and family matters. Conduct legal research and analyze legal issues raised in complex civil term and criminal motions. Prepare memoranda and research issues raised in ongoing appeals, including developing flowcharts to map out relevant parties in complex commercial litigation case, drafting reports for add-on Article 78 motions, creating tables to compare recent first department awards for pain and suffering in severe burn cases. Draft proposed motions and orders including reargument and leave to appeal reports.

ATLANTIC RECORDS, New York, New York

Legal Intern Spring 2020

Reviewed and edited recording agreement contracts, including single and 360 deals. Assisted in drafting proposals for ongoing recording deals.

BROOKLYN NETS, New York, New York

Legal Intern Fall 2019

Drafted cease and desist letters. Wrote complaints in preparation for litigation of team's branding rights. Delivered memoranda on trademark, copyright, and property issues. Reviewed and edited various contract agreements.

JUDICIARY SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW, Washington D.C.

Legal Fellow Summer 2019

Conducted extensive research and drafted memoranda on issues relating to data privacy and tech monopolization. Drafted questions for Congressional hearings. Drafted meeting materials for Chief Majority Counsel and Subcommittee Chairman. Attended Congressional hearings and meetings with stakeholders.

QUEENS SUPREME COURT, CIVIL TERM, Queens, New York

Judicial Intern for the Honorable Salvatore Modica Summer 2018

Researched and prepared memoranda on various trial court issues such as the admissibility of certain expert testimony, contract disputes, and tort liability. Drafted argument on a procedural issue dealing with a foreclosure action.

BAR ADMISSIONS

State of New York - Appellate Division, First Department, 2022

State of Maryland - 2021

Nathan Adal
New York University School of Law

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Troy Mckenzie	B	5	
Contracts	Clayton Gillette	B	4	
Lawyering	Paulina E Davis	CR	2.5	CR (Credit Received)
Torts	Eleanor Fox	B	4	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Rachel Barkow	B	4.0	
International Law	Jose Alvarez	B	4.0	
Lawyering	Paulina E Davis	CR	2.5	Credit Received
Legislation and the Regulatory State	Brookes Billman	B	4.0	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Emiliano Catan	A-	5.0	
Evidence	Daniel J Capra	B	4.0	
Property	Vicki L. Been	B-	4.0	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	David Pozen	B	4.0	
Contemporary Issues in Immigration Law	Judy Rabinovitz, Omar Cassim Jadwat	A-	3.0	
Contemporary Issues in Immigration Law Writing Credit	Judy Rabinovitz, Omar Cassim Jadwat	A-	0.0	
Racial Justice Clinic	Dale Ho, Claudia Angelos, Jason Williamson	B+	2.0	Seminar and Field Work were separated out
Racial Justice Clinic Seminar	Dale Ho, Claudia Angelos, Jason Williamson	B+	3.0	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contract Drafting	Naveen Thomas	CR	3.0	CR=Credit Received (Class Taken as Pass/Fail)

Global Justice Clinic	Ellie Happel, Cesar Rodriguez	B+	3.0
Global Justice Clinic Seminar	Ellie Happel, Cesar Rodriguez	B+	4.0
Journal of Law and Business		CR	1.0
Negotiating Corporate Transactions	Chris Harrison	B+	2.0
Research Seminar for Future Academics	Florencia Marotta	A	2.0

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Accounting for Lawyers	Stanley Siegel	CR	2.0	All classes were mandatory Pass/Fail due to COVID-19
Antitrust Counseling in the Distribution of Goods and Services	Irving Scher	CR	2.0	
Global Justice Clinic	Ellie Happel, Cesar Rodriguez	CR	3.0	
Global Justice Clinice Seminar	Ellie Happel, Cesar Rodriguez	CR	4.0	
Professional Responsibility in Criminal Practice Seminar	David E Patton	CR	2.0	
Research Seminar for Future Academics	Florencia Marotta	CR	2.0	



2020.10.20

To Whom It May Concern:

It is my pleasure to recommend Nathan Adal for a judicial clerkship with your chambers.

I am the Co-founder and Chief Legal Officer of Justpoint. Nathan worked for us as a legal intern remotely over the summer of 2019.

As an intern, Nate worked on compliance issues, dealing with several important and sensitive matters, in addition to helping us understand how various HIPAA regulations and the CCPA relate to our company goals. I thoroughly enjoyed working with Nathan -- he was a valuable asset to our team. He navigated complex legal issues well and came up with creative solutions to challenging legal questions. He proactively asked for more transactional experience and provided thorough redlines on multiple contractual agreements. Nathan is calm, diligent, and friendly in all his interactions, and he was always willing to put his best foot forward to assist our team. I believe he would be a valuable asset at your firm.

If you have any questions regarding his candidacy, please contact me at 917-567-0131. Thank you.


Best,

Serge Zenin, Esq.

Co-founder and Chief Legal Officer Justpoint

www.justpoint.com

 info@justpoint.com

 (347) 377-0782

June 16, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

It is my pleasure to recommend Nathan Adal for a clerkship with Your Honor and the United States Courts.

I am an International Law Professor currently teaching at New York University School of Law. I was a chaired professor of international law at Verona University in Italy from 2002-2016, and a chaired professor of comparative law at Tilburg University from 1995-1998 and University of Bologna from 1998-2002. I have published more than 280 law review articles in various languages and 20 books in the areas of international commercial law, conflict of laws, comparative law, and international commercial arbitration.

Nathan worked as my research assistant during the fall of 2018. As an intern he helped edit a peer reviewed law review, the European International Arbitration Review, of which I am the general edit. I thoroughly enjoyed my time working with Nathan, and he was a valuable asset as an editor. He is an incredibly calm, friendly, and hard-working person who set out to help in the best way he could. Nathan was a dedicated and a knowledgeable employee who delivered his work product efficiently and punctually. While the pressures of working as a clerk for a District Court are numerous, I believe Nathan is up for the challenge and would excel if given the opportunity.

If you have any questions regarding his candidacy, please contact me at franco.ferrari@nyu.edu. Thank you for your time and consideration.

Best,
Franco Ferrari

Franco Ferrari - franco.ferrari@nyu.edu - (212) 992-8123

June 16, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

This letter will recommend Nathan Adal for a Clerkship with Your Honor and the United States Courts.

I am the Principal Law Clerk to Justice Allan B. Weiss, a State Supreme Court Justice of New York State, Queens County.

When I served as Principal Court Attorney to Justice Salvatore J. Modica [now retired], in a busy Individual Assignment Part, presiding over a steady series of trials of civil actions, conducting conferences of settlements and discovery disputes in civil litigations, and deciding thousands of motions brought in civil litigations, NATHAN ADAL worked under my personal supervision. I have been a member of the New York Bar for over 41 years, and for over 25 years have been employed by the Unified Court System of the State of New York.

During several months of 2018, Nathan Adal was an intern to Justice Modica's Chambers. I closely supervised his work and engagement with our Chambers. I am personally aware of the heavy demands of working for the federal courts since a close friend of mine, Hon. Thomas M. Reavley of the Fifth Circuit, is a senior justice of the United States Court of Appeals. Nathan Adal possesses a profound interest in the law and is capable of making an excellent contribution to the pressing work of a busy Chambers of a distinguished jurist. Nathan attended numerous trials, and, based on his thirst for knowledge, I gave him reading materials and books that he readily assimilated and closely supervised his legal research. Nathan was one of the finest interns that I had the pleasure of mentoring.

I found Nathan Adal to be very bright, diligent, hard-working, ethical, responsible, mature, very friendly and personable, and a person who has a desire to learn and to help others. He left our Chambers to return to his studies at NYU School of Law, where I also graduated [in 1978]. NATHAN ADAL is truly superb. If Mr. Adal is fortunate to work under the supervision of a diligent judge, I believe that Mr. Adal will be able to make a major contribution one day to our system of justice. I recommend NATHAN ADAL enthusiastically. If you have any further questions, please call me at 718-298-1184 or 917-365-4865.

Very truly yours,

HOWARD LLOYD WIEDER
Principal Court Attorney to Justice Allan B. WEISS

Howard Wieder - hwieder@nycourts.gov

Brief Explanation of Writing Sample:

During the 2019-2020 academic semester, I was a student member of an international human rights NYU law clinic. One of my team's yearlong projects was developing content for an anti-mining campaign website. The following excerpt is one of the sections I wrote for the website development analyzing the potential economic ramifications mining might bring to Haiti's general population.

Metal mining is sometimes thought of as a reliable economic engine for any country. However, translating scarce natural resources into public welfare is far from automatic. It is important to consider whether mining is an appropriate economic activity for a given country—in this case, Haiti—and if the potential benefits outweigh the risks. It is also worth noting that countries in the Global South are increasingly coming to the conclusion that mining may not lead to generational wealth, but will decimate fragile ecosystems and render other economic activities impossible.¹

Economics of Mining

Mining is an inherently unsustainable practice: the ore that is extracted is not replenished, and over the life cycle of the mine the minerals are depleted. The financial risk factors that come with mining include issues such as high capital costs with potentially low return on investment, fluctuating gold prices, and “cut-off” grade factor, described below.

Another revenue risk for mining derives from the variability of gold prices.² However, gold prices fluctuate substantially, and must be taken into account before further exploration. Over the last thirty years (approximate life-span of an open-pit mine) gold has ranged from just over \$350 per ounce to \$2000 per ounce. In the past ten years gold has jumped from \$1000 to \$1900 per ounce.

Does mining present unique challenges for Haiti?

¹ Ellie Happel, *Metal Mining Would Be Disastrous for Haiti*, N.Y TIMES (Mar. 29, 2018) <https://www.nytimes.com/2018/03/29/opinion/metal-mining-haiti.html>

² Global Justice Clinic & Haiti Justice Initiative, *Byen Konte Mal Kalkile? Human Rights and Environmental risks of gold mining in Haiti* 121 (Dec. 2015).

Haiti is a predatory state: those in political power extract, maintain, and reproduce their wealth through land grabs and corruption.³ In assessing the prospect of mining in Haiti, it is imperative to note Haiti's weak government, limited oversight capacity, and pervasive corruption. Haiti has a weak regulatory system and is, even without industrial metal mining, one of the most environmentally degraded countries in the world. The government demonstrates almost no ability to anticipate or mitigate natural disasters, or to support ecological sustainability.⁴ Further, the government lacks the will and/or capacity to collect taxes, particularly from the upper class.⁵

Haiti is known to be home to one of the most corrupt governments in the western hemisphere. The PetroCaribe corruption scandal that erupted in recent years is further evidence of a kleptocratic state.⁶ And, metal mining is known to be one of the industries most vulnerable to corruption in the world. Haiti is ranked 161 in the Transparency International index.⁷ (Transparency International is a global coalition that fights against corruption.) The risk, or even likelihood, of corruption is one more factor that must be considered in weighing whether or not mining is an appropriate industry in Haiti.

Furthermore, Haiti does not present a competitive case for mining compared to its peers. Haiti, as aforementioned, has a poor regulatory environment and possesses subpar infrastructure. The World Economic Forum, an NGO that engages political, business and other leaders in global, regional and industry agendas, found that the efficiency, trustworthiness, and confidence in Haiti's financial market remains very low. The Heritage Foundation, an American conservative think tank that focuses on

³ Id. at 2-3

⁴ Id. at 33

⁵ Id. at 26

⁶ Centre de Facilitation Des Investissements, *Haiti Sector Identification Sector Report I Mining* 19, (Sept. 22, 2017)

⁷ Id. at 20

public policy, finds that Haiti's inflation rate of 7.5% is a concern, which is the highest among its peers in the Global South.⁸

There are other challenges for mining in Haiti. Haiti's susceptibility to natural disasters makes mining a precarious operation. Natural disasters not only affect the daily activities of the mine, but could pose risks to the infrastructure of the mines and also can negatively affect the surrounding communities. In addition to the potential threat of natural disasters, there is currently also an insufficient mapping of mineral resources in the country, and there is no trained labor force currently able to safely ensure the success of the mine. Furthermore, because of the corruption that exists within the Haitian government, there is a chance that deals with foreign investors could be imbalanced agreements that negatively impact the Haitian people. That imbalance might also bleed into prioritizing mining over agriculture as both fields share similar resources, such as land and water. Mining might negatively impact one of Haiti's primary sources of revenue if not appropriately handled.⁹

What fiscal regimes does Haiti have in place to generate revenue from mining?

In *Byen Konte, Mal Kalkile? Human Rights and Environmental Risks of Gold Mining in Haiti*¹⁰, the authors pursue an economic hypothetical. They assume that Haitian Parliament passes the draft mining law, submitted to them in 2017. Further, it assumes that Haiti's Investment Code applies to mining companies. The hypothetical explains that the two most relevant sources of income for the Haitian government would be the 30 percent corporate income tax rate and the four percent mining

⁸ Id. at 19

⁹ Id. at 34

¹⁰ Global Justice Clinic & Haiti Justice Initiative, *Byen Konte Mal Kalkile? Human Rights and Environmental risks of gold mining in Haiti* (Dec. 2015). The information from the next three paragraphs comes from Byen Konte, unless otherwise stated.

royalty tax. The author challenges the idea that, under these circumstances, the revenue stream would be significant.

First, because of several tax exemptions provided in Haiti's Investment Code, corporate income tax may not generate substantial revenues for many years following the commencement of mining. In 2002, Haiti amended its Investment Code to add tax incentives designed to attract investment and new businesses to Haiti. The potential tax benefit granted to a mining company could be enormous; according to Article 27 of Haiti's Investment Code, qualifying companies are exempt from all corporate income taxes and from local taxes for up to 15 years. After this period, income tax liability is phased over six years; the company taxed on 15 percent of its net taxable income the first year, 30 the second year, 45 the third, 60 percent the fourth, 80 percent the fifth, and 100 percent thereafter. If this tax benefit were applied to mining companies¹¹ the mining companies would not be fully liable for income tax until 21 years after the mining companies' first production and sale of gold. For most mines this would include peak production, which would prevent the State from capturing most of the mines' net revenues.

Second, the royalty tax is low. When applied to the estimated—but, as stated above, not confirmed—quantity of gold a company could extract, it is unlikely that the government can recoup significant revenue from production. The hypothetical explored in *Byen Konte, Mal Kalkile* took the estimated value of gold in Haitian soil to be \$20 billion, and the number of years necessary to fully exploit the resources to be 25 years. In this scenario, Haiti's gold would generate around \$800 million in royalties over the next quarter of a century. On average, the gold production and sale of its gold

¹¹ Haiti's Center for Facilitation of Investments (CFI) has stated in correspondence with the Global Justice Clinic that the tax exemption could apply to mining companies.

reserves would be around 32 million, which would be 0.37 percent of Haiti's current annual gross domestic product. On a per capita basis, gold mining would produce \$3.20 for each Haitian per year of mining, augmenting the per capita income by less than one half of one percent.

Even if the taxes and royalties were beneficial, illegal mining can take away much of the revenue from the Haitian government. In Peru, Latin America's largest gold producer, and one of the top gold producers worldwide, there was an estimated \$15 billion worth of gold produced illegally or informally between 2003 and 2014, which means an estimated loss of between \$1.4 billion and \$4.9 billion to the country's treasury.

The surprisingly low level of revenues that Haiti is likely to receive from gold mining coupled with legitimate, evidence-based concerns about how the government would use any income call into question whether the potential economic benefits of mining justify the probable risks to public health, the environment, local communities, and human rights.

Metal mining presents unique challenges to even the most developed nations¹²; the industry could spell disaster for a country like Haiti. Haiti's pervasive corruption, the country's industry-favorable tax regime, and the perpetually fluctuating economy of metal mining make the industry's chances of success in Haiti incredibly unlikely.

¹² Global Justice Clinic & Haiti Justice Initiative, *Byen Konte Mal Kalkile? Human Rights and Environmental risks of gold mining in Haiti* (Dec. 2015).

HAMPTON COUNTY, STATE OF NEW JERSEY
BRENNAN TOWNSHIP MUNICIPAL COURT

STATE OF NEW JERSEY,

v.

WILLIAM STEWART,

Defendant.

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NO. 18-S-0207

**DEFENSE BRIEF IN SUPPORT OF
MOTION TO DISMISS**

Respectfully submitted,

Nathan Adal

Assistant Municipal Public Defender
Brennan Township, New Jersey

TO: Anne Arcoleo, Esq.
Assistant Municipal Prosecutor
Brennan Township, New Jersey

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TABLE OF AUTHORITIES**Cases**

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<i>Hague v. Comm. For Indus. Org.</i> , 307 U.S. 496, 515 (1939)	8
<i>Int'l Soc'y for Krishna Consciousness v. Lee</i> , 505 U.S. 672, 679-80 (1992)	8
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<i>State v. Newell</i> 152 N.J. Super. 460, 378 A.2d 47 (1977)	7
<i>United States Postal Serv. v. Council of Greenburgh Civic Ass'ns</i> , 453 U.S. 114 (1981)	9
<i>United States v. Grace</i> , 461 U.S. 171 (1983)	9
<i>United States v. Kokinda</i> , 497 U.S. 720 (1990)	8

Statute

N.J. Stat. Ann. § 2C:33-4(a) (West 2017)	6, 7, 10, 11, 13
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PRELIMINARY STATEMENT

“No good deed goes unpunished.” The wisdom of this sardonic adage screams volumes in the case at bar. Defendant William Stewart (“Stewart”) is an 18-year-old man with a passion for basketball who wanted to help his team at the Brennan Community Center (“Center”), an ostensibly not-for-profit organization, by standing outside in the cold, in the winter of 2018, to solicit and collect money to buy uniforms. No part of the sums that Stewart collected was for himself. His sole motives were charitable and eleemosynary.

Just as in the adage quoted above, Stewart, with this prosecution looming over him, realizes that even an act of kindness can backfire. Stewart, still a teenager, faces the prospect of having a criminal conviction on his record, for the remainder of his life, based on the allegations of a complaining witness, one Millie Robbins (“Robbins”), who objected to being approached for money outside her bank. Even according to Robbins’s account, Stewart did not employ any foul language. Stewart denies taunting Robbins at all, when she refused to contribute. Even crediting Robbins’s account for the purposes of this motion to dismiss - - and Stewart vehemently denies the truth of the accusations - - referred to her only as a “one percenter” and a “Scrooge.” To allow such words to constitute harassment would swell the dockets of this Court and reduce the First Amendment to a mere precatory admonishment.

At any rate, as discussed herein, Stewart was soliciting money at the Cavanaugh Plaza (“Plaza”) that is wholly owned by the Township of Brennan. Stewart was on public grounds. His first defense is that he was engaged in constitutionally protected activity in that Plaza, a pedestrian-only commercial plaza, is a public forum. Second, referring to someone as a “one percenter” or a “Scrooge” - - assuming arguendo the truth of Robbins’s allegations - - these epithets, although not complimentary or even polite, hardly make out a case for harassment.

STATEMENT OF FACTS

When Stewart first asked Robbins for money in the Plaza on January 26, 2018, she refused. According to Robbins, on January 26, and on three subsequent occasions, Stewart responded to Robbins's lack of philanthropy by calling her a "Miss One Percent" and "Scrooge." Also, according to Robbins, Stewart stated on January 26th, "I see you looking at me and I won't forget!" Stewart was arrested on February 4th for one disorderly conduct charge in violation of the Revised Ordinances of Brennan Township, and one count of harassment in violation of section 2C:33-4(a) of the New Jersey Code of Criminal Justice.

Although the Center does not explicitly approve solicitation, other teenagers of the Center engaged in similar charitable fundraising activities. They were collecting for uniforms for their basketball team consisting of persons under the age of 20 years old.

The Plaza is located on Concord Avenue between Grant Street and the municipal Library. The Plaza, which formerly permitted vehicles, is now a pedestrian-only commercial property owned by the Township and managed by a local Chamber of Commerce. Street Improvement App. The Plaza has been recently renovated, some of the improvements include an elevation of the street level to make it even with the sidewalk, small fountains, trees, benches, and new public art and sculptures. Street Improvement App. The entire area was repaved by antique bricks. Street Improvement App. The street is closed to vehicular traffic, and the CPCC hired additional security to alleviate the Brennan Police Department. The Plaza is also a venue for free concerts and festivals. Street Improvement App.

QUESTIONS PRESENTED

The questions before the court are as follows:

- (1) Is the Plaza a traditional public forum such that the First Amendment applies and would the panhandling underlying the disorderly conduct charge be considered protected speech?; and
- (2) Are Robbins's allegations about Stewart's conduct sufficient enough to support a harassment charge under N.J. Stat. Ann. Section 2C:33-4(a) (West 2017).

LEGAL DISCUSSION

I. THE CHARGES MUST BE DISMISSED BECAUSE THE PLAZA IS A PUBLIC FORUM

The defense respectfully requests that the Court dismiss all charges against Stewart, pursuant to New Jersey's Rule Governing Criminal Practice 3:10-2(d), because the facts alleged in this particular case do not make out the offense charged. *See, State v. Newell*, 152 N.J. Super. 460, 466, 378 A.2d 47, 50 (1977). The Plaza is indeed a public forum, with limited restrictions on the freedom of speech.

The Supreme Court has previously identified the types of constitutionally protected speech based on the classification of the property. The Supreme Court distinguishes between a traditional public forum, a designated public forum, and a non-public forum. *See, Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

Public forums are the types of forums where speech is most protected. Typical instances where speech is most protected are usually public parks, sidewalks, and streets. The Supreme Court has held that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939). Streets and parks are quintessential public forums although limitations can be

placed on these prime examples as evidenced by *United States v. Kokinda*, 497 U.S. 720, 732 (1990).

However, the case at bar is not analogous to *Kokinda*, where the Supreme Court held that a sidewalk could be considered a non-public forum. In *Kokinda*, the sidewalk was in close proximity to a traditionally non-public forum. The Court there stated, “The history of regulation of solicitation in post offices demonstrates the reasonableness of the provision here at issue. The Postal Service has been regulating solicitation at least since 1958.” 497 U.S. at 731. The court found here that a forum was non-public because of the forum’s long history of being non-public and of the general public’s knowledge of the area’s limitations. See *Id.* at 733. The non-public status that the Court held in *Kokinda*, does not apply to the Plaza because the Plaza is not near a traditionally non-public forum like a post office, but instead leads to a library, which is a public institution.

The Plaza is indeed a public forum, and, although the Supreme Court has not outlined a bright line rule to determine whether or not an area is a public forum, the Supreme Court has held that a public designated forum can remain so through an “implied act” such as failure to indicate that it is a private area. See, *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 680 (1992). See generally, *Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, 148 F.3d 242 (3d. Cir. 1998), *cert. denied sub nom. Southeastern Pennsylvania Transp. Auth. v. Christ’s Bride Ministries, Inc.*, 525 U.S. 1068 (1999). The Plaza was traditionally a public forum, and although the renovations might be noticeable, it is not enough to indicate that the Plaza has reconfigured itself to be a non-public forum.

The Supreme Court also has held that renovation of a previously public forum does not necessitate a change in First Amendment protections. “The city may not by its own *ipse*

dixit destroy the public forum status of streets and parks which have historically been public forums." *United States v. Grace*, 461 U.S. 171, 180 (1983) (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)). This conclusion is further evidenced by the ruling in *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003), where the court held that if a plaza maintains its use as a public thoroughfare, even after private parties renovated it, it is still likely a public forum. Although this case falls under the jurisdiction of the Third Circuit, there is not a dispositive case on this matter in that particular Court, which necessitates an examination of other Circuit decisions. The defendant city, in *ACLU of Nevada*, turned several blocks of a street into a publically owned pedestrian mall and restricted First Amendment activities, but the court found that, "[d]espite its expensive make-over, the Fremont Street Experience remains a public thoroughfare." *Id.* At 1102. Although the Fremont Street Experience was closed off to vehicle traffic, the property opened up its space to pedestrians at all times, the cosmetic differences were not substantial enough to distinguish it from other public forums, and the property had a history of being a public forum. *Id.* at 1102-1103.

In the present case, the Plaza still remains a public forum because the physical alteration does not change the purpose of the forum. Although the streets have changed from a place of vehicular transportation to a pedestrian thoroughfare, the renovation does not change the expressive use. Like in *ACLU of Nevada*, the Plaza, in the case at bar, is closed off to vehicular transportation. In both properties, the commercial venues have designated spaces for the pedestrians to traverse. The purpose of the change in the Plaza, in the case at bar, is to bring "increased revenues to area businesses." Street Improvement App. The cosmetic differences in Plaza, such as the repaved roads, is not so dissimilar from the Fremont Street Experience because in both places the plaza still encourages pedestrians to walk by businesses and shops. *Id.* The

cultural elements, furthermore, encourage pedestrians to walk through the area through the Plaza's promotion of free events in the form of free concerts and festivals.

Since the Plaza is a public forum, and Stewart's speech was constitutionally protected, this Court should dismiss the disorderly conduct charge.

II. THE HARASSMENT CHARGE MUST BE DISMISSED BECAUSE IT DOES NOT CONSTITUTE A PURPOSE TO HARASS

Stewart has been charged for one count of harassment in violation of section 2C:33-4(a). The facts in question do not make out the particular offense. A defendant's conduct will constitute harassment under the New Jersey statute, "if, with purpose to harass another, he: (a) makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm" N.J. Stat. Ann. § 2C:33-4(a) (West 2017). Stewart's conduct does not satisfy the criminal elements of the offense.

In order to be found guilty, there must be a purpose to harass. A purpose to harass can be inferred from history between parties, and there must be evidence that his intention was to alarm or annoy. *See, State v. Burkert*, 231 N.J. 257, 174 A.3d 987 (2017). The State must allege facts demonstrating that the accused acted with improper purpose and "with a conscious object . . . to annoy" *Id.* The harassment statute was enacted to "regulate(s) conduct, not mere speech." *State v. Fin. Am. Corp.*, 182 N.J. Super. 33, 39, 440 A.2d 28, 31 (1981).

Most of the cases that fall under section 2C:33-4(a) relate to domestic violence because the harassment statute was enacted "to make criminal, private annoyances that are not entitled to constitutional protection." *State v. Duncan*, 376 N.J. Super. 253, 870 A.2d 307, 311 (2005). The defense argues that Stewart's speech constituted was an annoyance enough to cause harm, but

Stewart's actions do not constitute harassment under the New Jersey statute. He did not intend to harass. The case at bar is analogous to *State v. Duncan*, where the defendant called the 9-1-1 operator a Nazi and used expletives. The court agreed that while the "defendant's venting of his frustration to the 9-1-1 police dispatcher in crude terms over what he regarded as an improper roadblock, though constituting impolite and rude behavior, (it) did not evidence 'a purpose to harass another' within the meaning of N.J.S.A. 2C:33-4." 376 N.J. Super. at 355, 870 A.2d at 308. Stewart's actions are similar to the defendant's actions in *Duncan*, in that his comments were not intended to harass Robbins but release pent-up frustration about a perceived apathy on behalf of Robbins. Furthermore, he did not stand on that corner just to wait for her; he was trying to raise money for his community center by standing within the plaza. Although Robbins goes to the ATM frequently to get money, the repeated occurrences were mere fortuity rather than an invasion of privacy as Stewart is often there regardless of Robbins in order to fundraise for his basketball team.

III. HARASSMENT CHARGE MUST BE DISMISSED BECAUSE THE MANNER OF THE COMMUNICATION DID NOT INVADE PRIVACY

Purpose to harass underlies each element of N.J.S.A. 2C:33-4(a), but the statute itself according to the New Jersey Supreme Court's interpretation of the legislature "encompass only those types of communications that also are invasive of the recipient's privacy." *State v. Hoffman*, 149 N.J. 564, 583, 695 A.2d 236, 245 (1997). So when there is an examination of the non-dispositive factors listed in N.J.S.A. 2C:33-4(a), in addition to purpose to harass, the Court must ascertain whether the communication was invasive of privacy in each segment of 2C:33-4(a) which are again: 1) The communication was sent anonymously, 2) It was at an extremely inconvenient hour and 3) If it was offensively coarse language.

The State will not challenge either the anonymous factor (He appeared before Robbins in the flesh) or the inconvenient hour (as the interactions happened during business hours). The third component of the statute was also not criminally offensive in terms of the statute. The term offensively coarse language must be examined in the “totality of the circumstances”, particularly again in domestic violence cases. *Hoffman*, 149 N.J. at 584, 695 A.2d at 246. For example, in *Cesare v. Cesare* 154 N.J. 394, 713 A.2d 390, 395 (N.J. 1998), the plaintiff, the wife, decided to file under the harassment statute because her husband made vague threats about killing her. The Court ruled that the husband’s comments were invasive of her privacy after looking at their entire violent history. The court’s understanding of offensively coarse language in other cases, without prior violent history, was found to be something as vulgar as the N-word, 182 N.J. Super. at 41, 440 A.2d at 32. Offensively coarse is something very obscene and not something that the courts should take lightly.

The facts alleged, here at the case at bar, do not suffice under either the offensively coarse language. Offensively coarse again must be examined through prior history or by its blatant disregard for humanity. Here, Stewart, called her “Scrooge”, and “Miss One Percent” with again no prior history. While these terms might be offensive, the court would be unwise to deem this criminally liable in order to not overstep an individual’s civil rights because of these words ubiquity in the public lexicon. Mere insults do not suffice.

The court in *Hoffman* ruled that although the “annoyance or alarm required by subsection (a) need not be serious, the catchall provision of subsection (a) must be interpreted to protect against unconstitutional vagueness and impermissible restrictions on speech.” 149 N.J. at 581, 695 A.2d at 245. Therefore, there intrinsically still has to be a “purpose to harass” within the legal framework of invasion of privacy. In *Peranio v. Peranio*, 280 N.J. Super 47, 654 A.2d 495

(1995), for example, a husband threatened to “bury” his wife when she got rid of his property, and, although the court found this statement alarming, his actions did not constitute harassment under the statute. To be actionable, the harassment must be “invasive of the recipient’s privacy.” *Hoffman*, 149 N.J. at 583, 695 A.2d at 245. Stewart’s actions, according to the statute, cannot possibly be understood as harassment. In *Peranio v. Peranio*, a man said that he was going to bury his wife, and the court thought that was alarming but did not constitute harassment even after noting the prior history because divorce is an arduous period in one’s life, and his frustration did not constitute a purpose to harass even if it was invasive. *Peranio*, 280 N.J. Super at 52, 654 A.2d at 498. If the Court in *Peranio*, did not consider there to be an intent to harass after he used offensively coarse language such as “bury” her, then an 18-year old using non-coarse, non-threatening, and non-foul language such as “Scrooge” and “Miss One Percent” does not meet the statutory standard of harassment either.

Robbins’s allegations that Stewart said, “I see you looking at me and I won’t forget!” might be actionable under the statute. Yet even if this statement was made, and Stewart denies making them, these two people have no personal relationship with one another. Second, noting that they have no prior history with each other, Stewart did not make efforts to personally seek out Robbins. He did not intend to harass, and as stated in the police report, he “chose to collect on the Plaza because there’s a lot of foot traffic.” Report. Third, the purported comment of “I won’t forget” is innocuous in light of the high threshold of offensively coarse language.

Even if these words might alarm an individual with a fragile disposition, such comments do not constitute harassment. This Court, pursuant to section 2C:33-4(a) of the New Jersey Criminal Statute, should dismiss the charges.

CONCLUSION

Based on the foregoing applicable law, the Court should dismiss the charges against Stewart because Cavanaugh Plaza is a public forum, and the prosecution failed to allege facts that constitute an offense under the New Jersey criminal statute.

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June 23, 2023

The Honorable P. Casey Pitts
District Judge, U.S. District Court for the Northern District of California
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Dear Judge Pitts,

I am a recent Tech Edge J.D. graduate and outgoing Editor-in-Chief of the High Technology Law Journal at Santa Clara University School of Law. I am writing to apply for a 2023–2024 term clerkship in your chambers. My judicial externships with Judge Illston and Judge Orrick convinced me that clerking at the Northern District is my first choice for a job upon graduation.

I am particularly interested in a clerkship with you because of your dedication to equality in the administration of justice. My experiences as a single mother and person with disabilities fuel my commitment to equity and inclusion in the legal field. As a lifelong educator, I focused on public interest legal work in law school and recently served as student pro bono counsel in an immigration appeal at the Ninth Circuit Court of Appeals. In addition to completing judicial externships, my law school experiences have prepared me well for a clerkship in your chambers—I was in the top 2% of my 2L class, and I have published three papers while in law school. Last summer, I served as a judicial extern at the PTAB, assisting administrative law judges with AIA trials and gaining experience with federal administrative agencies. My background as a microbiology professor makes me uniquely situated at breaking down complex details of intellectual property and antitrust cases in concise memorandums and opinions.

Attached for your review are my resume, most recent law school transcript, writing samples, and list of references. The first writing sample is an excerpt from my Thomas Tang Moot Court brief that won the National Best Brief award. Letters of recommendation from Santa Clara Professors Evangeline Abriel, Mary Procaccio-Flowers, and Nicholas Serafin were sent under separate cover.

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,



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- Colleen V. Chien, Janelle Barbier & Obie Reynolds, *The AIA At Ten: How Much Do Pre-AIA Prior Art Rules Still Matter?*, 35 PATENTLY-O PAT. L.J., 1–4 (2021).
- Dominic Picetti & Janelle Barbier et al., *Evaluation of a Syringe Exchange Program in a Mid-sized Semi-rural County: Analyses of Client Demographics, Drug Use and SyringeSharing Behaviors*, 2 INT'L J. HEALTH, WELLNESS & SOC'Y, 53–66 (2013).

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WRITING SAMPLE

PERSUASIVE APPELLATE BRIEF FOR U.S. SUPREME COURT

Brief For Respondents In Opposition

I wrote the attached brief as a competitor in the Thomas Tang Moot Court Competition in the Fall of 2022. The brief won an award for National Best Brief. The brief simulated a Respondent Brief for a case in front of the United States Supreme Court. I also received an award for Regional Best Oralist in the competition.

The attached excerpt contains the legal argument for Issue I and other portions submitted as part of the brief. I wrote all portions in the excerpt on my own. I have omitted portions written by my partner on Issue II. I conducted the legal research and wrote the portions myself. I did not receive any comments for revisions because this was prohibited by the competition, and the work is entirely my own. In addition, I edited the portions on my own.

I was assigned the position of Plaintiff-Respondents Ms. Zhang and Dr. Harjo. In the case, Respondents sued Defendant-Petitioner Tang University for intersectional discrimination under Titles VI and IX. The district court dismissed the complaint, and the court of appeals reversed. There are two issues on *certiorari*: (1) whether Titles VI and IX permit claims based on combined race-gender stereotyping; and (2) whether Title VII preempts retaliation claims under Titles VI and IX. At the time of writing, the first issue on intersectional discrimination under Titles VI and IX involved a question of first impression in the U.S. Supreme Court.

No. 21-0578

IN THE
Supreme Court of the United States

TANG UNIVERSITY,
Petitioner,
v.

MEIHUA ZHANG AND PAULI HARJO,
Respondents.

*On Petition For A Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit*

BRIEF FOR RESPONDENTS
IN OPPOSITION

RESPONDENT 69
Counsel for Respondents

QUESTIONS PRESENTED

- I. Whether Title(s) VI and/or IX recognize a claim for discrimination based on combined race-gender stereotypes?
- II. Whether Title VII preempts retaliation claims under Title IX and Title VI and, if it does not, what analytical standard applies to such claims under Titles IX and VI?

PARTIES TO THE PROCEEDINGS

Petitioner is Tang University, a private university in the State of Apalsa that receives funding from the federal government. Respondents are Ms. Meihua Zhang and Dr. Pauli Harjo, both individuals.

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OPINIONS BELOW¹

The Court of Appeals for the Thirteenth Circuit’s opinion reversing the judgment of the district court is unpublished. *See* Petition Appendix (“Pet. App.”) A. The District Court of Apalsa’s decision dismissing Respondents’ claims is unpublished. *See* Pet. App. B.

JURISDICTION

The court of appeals’ judgment was entered on June 01, 2022. *Id.* at 3. The petition for a writ of *certiorari* was granted on July 08, 2022. *Id.* at 1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Title VI of the Civil Rights Act of 1964 (“Title VI”) provides:

[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI, 42 U.S.C. § 2000d.

Title VII of the Civil Rights Act of 1964 (“Title VII”) provides, in relevant part:

[i]t shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

¹ Respondents are aware of the rule that “items required by subparagraphs 1(a), (b), (d), (e), (f), and (g) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.” SUP. CT. R. 24-2. However, in this competition, Respondents are not provided with Petitioners’ briefs ahead of time and have chosen to include these sections in the Respondents’ Brief.

Title VII, 42 U.S.C. § 2000e-2(a). Title VII also includes a provision that expressly proscribes retaliation, stating in pertinent part:

[d]iscrimination for making charges, testifying, assisting, or participating in enforcement proceedings-

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor--management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id. at § 2000e-3(a).

Title IX of the Education Amendments of 1972 (“Title IX”) provides, in relevant part:

[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Title IX, 20 U.S.C. § 1681.

INTRODUCTION

Over fifty years of civil rights' laws compel the conclusion that discrimination—in any form—is condemned by our society. These laws protect the dignity and inherent human liberties of all people within this country's borders.

But not all discrimination is vindicated. As the “Me Too” movement has taught us, a major problem with sex discrimination is that it is under-reported, that it slips through the gaps. This is even more salient for what modern scholars term “intersectional discrimination,” where victims are targeted based on their interconnected identities. The court of appeals was concerned with the statistics; indeed, they are alarming. Non-white women are disproportionately sexually harassed in academic settings and are up to 32 percent more likely to become victims of gender-based violence than their white counterparts—they are also at a higher risk of not being believed.²

Respondents, Ms. Meihua Zhang and Dr. Pauli Harjo, are both non-white women. Statistically, they were more likely to become targets of racialized sex discrimination, fueled by stereotypes against their combined identities. And they did. Ms. Zhang for reporting, and Dr. Harjo for researching, gender-based violence. They now seek protection from the Court.

For decades, the “Court has embarked on the crucial mission . . . of assuring to all persons the protection of equal laws.”³ No doubt, it would be unprecedented to leave victims of discrimination without a legal remedy. The Court should close the gaps by affirming the legal rights of Ms. Zhang and Dr. Harjo. Holding otherwise would impede this important movement and send a message that non-white women are not worthy of protection.

² Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 9, 43 (2019).

³ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 293–94 (1978).

STATEMENT OF THE CASE

Ms. Meihua Zhang and Dr. Pauli Harjo (“Respondents”) are both affiliated with Tang University (“Petitioner”). The case is before the Court on a writ of *certiorari* following Petitioner’s loss at the court of appeals.

A. Factual Background

During 2020, while in her third year of Ph.D studies in Computer Science, Ms. Zhang experienced sixty days of relentless unwelcome contact by a faculty member at Ming University (“Angeli”). Pet. App. 4–5. Ms. Zhang first met Angeli at a cafe—after relaxing with a massage at the local day spa next door—when he engaged her in conversation about traveling in Malaysia. *Id.* at 4. Angeli had noticed that Ms. Zhang, a non-white woman of Asian descent, was reading a flyer for an upcoming book talk on Malaysia. *Id.* Angeli again approached Ms. Zhang at the book talk and invited her to dinner. *Id.* Upon exchanging contact information, Ms. Zhang learned that Angeli was a professor at Ming University. *Id.*

Prior to meeting Angeli for dinner, Ms. Zhang received a text message from Angeli making explicit sexual references to her Asian race and ethnicity, implying that Ms. Zhang was a sex worker. *Id.* Ms. Zhang felt ill at the thought of being propositioned for sex; she immediately told Angeli not to contact her again and blocked his number. *Id.*

Tang University's campus is adjacent to that of Ming University; the two colleges have a consortium agreement where students at both schools may attend courses at either university. *Id.* Like numerous other students, Ms. Zhang attended classes on both campuses. *Id.* at 5. In addition to finding Ms. Zhang at Ming University, where her classes were near Angeli’s office and classroom, Angeli sought Ms. Zhang out at Tang University, insisting that she speak with him. *Id.* at 4. Angeli did not apologize for his prior text message; instead, he implied that he assumed Ms.

Zhang was a prostitute because she worked at the day spa. *Id.* Ms. Zhang unequivocally instructed Angeli to not come near her again. *Id.*

Even after setting clear boundaries, Angeli would not stop—he would not accept that Ms. Zhang did not want to have any contact with him and attempted to force Ms. Zhang to associate with him. *Id.* at 5. But despite her pleas for help, Title IX coordinators at both universities refused to assist Ms. Zhang, nor provide her with any accommodations for the harassment she endured on a near daily basis. *Id.* Tang University’s Title IX Coordinator (“Mitchell”) interrogated Ms. Zhang about her relationship with the day spa and whether she could corroborate her experiences with witnesses or security camera footage. *Id.* Ms. Zhang requested redress in the form of a no-contact order to prevent Angeli from stalking her on either campus. *Id.* Asserting that Angeli was a charming man who brought money to Ming University, Mitchell responded with skepticism, deciding that Ms. Zhang’s claims were not worth pursuing. *Id.*

Ms. Zhang’s appeal to the Title IX coordinator at Ming University was likewise futile, purportedly because she was not a student at that university. *Id.* Angeli’s behavior continued to escalate—he repeatedly showed up at the day spa and waited outside watching the premises. *Id.* Unsettled by the persistent and ongoing attempts by Angeli to locate her, Ms. Zhang was forced to withdraw from school and pay out of pocket for counseling services. *Id.* She rearranged her entire life to avoid Angeli. *Id.*

Ms. Zhang received her first glimmer of hope when she met Dr. Pauli Harjo, an Associate Professor of Sociology at Tang University, at a “Take Back the Night” rally. *Id.* at 6. Ms. Zhang felt empowered by Dr. Harjo’s speech at the rally on discrimination directed at non-white women and agreed to share her experiences, escalating fear of stalking, and stonewalling by the Title IX coordinators, at the rally. *Id.* After hearing about Ms. Zhang’s experiences with Angeli and Tang

University, Dr. Harjo referred her to legal assistance networks and helped her file a complaint with the Office of Civil Rights (“OCR”) in January 2021. *Id.* Further, Ms. Zhang allowed executive members of the Pan-Asian Pacific American Student Associations (“PAPASA”) at both universities to organize protests around her case. *Id.* PAPASA invited Dr. Harjo to speak at the protests, but little did she know that doing so would make her the next victim of Tang University’s discrimination. *Id.*

[Section II Facts Omitted]

B. Procedural History

In 2021, Respondents each filed independent discrimination actions against Petitioner in the United States District Court for the District of Apalsa. *Id.* at 3. Ms. Zhang—after filing a complaint with OCR—filed claims under Title IX and Title VI for hostile environment harassment based on her race and sex as a non-white woman. *Id.* at 6–7. After obtaining a “right to sue” letter from the Equal Employment Opportunity Commission (“EEOC”), Dr. Harjo filed claims for gender and race discrimination against non-white women faculty under Title VII and for retaliation under Title VII, Title IX, and Title VI. *Id.* at 7.

Respondents filed a joint motion to consolidate the two actions which was granted by the district court. *Id.* Petitioner moved to dismiss most claims—with the exception of Dr. Harjo’s Title VII claims—pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that Respondents had failed to state valid claims. *Id.* at 3, 11. Over Respondents’ protests, the district court determined that Ms. Zhang did not suffer harassment based on her race or on her sex, that Title VII preempted Dr. Harjo’s claims, and that Dr. Harjo did not meet the requisite “but-for” causation standard. *Id.* at 16–18. Respondents timely appealed. *Id.* at 3.

In June 2022, the Court of Appeals for the Thirteenth Circuit reversed the district court’s

judgment, finding several errors in the district court’s conclusions of law. *Id.* at 13. Agreeing with Respondents, the court of appeals held that Respondents pleaded cognizable discrimination claims under Title VI and Title IX, as both statutes preclude intersectional discrimination. *Id.* at 11, 13. Moreover, Title VII did not preempt Dr. Harjo’s claims—under the proper “motivating factor” standard, Dr. Harjo alleged sufficient facts to support plausible claims under Title VI and Title IX. *Id.* at 13.

SUMMARY OF ARGUMENT

The Court should affirm the judgment of the Court of Appeals for the Thirteenth Circuit and preserve protections for victims of invidious discrimination. Holding otherwise would take the grave step of denying redress for statutorily prohibited discrimination and retaliation.

I. The Court Of Appeals Correctly Reinstated Respondents’ Title VI And Title IX Discrimination Claims.

Respondents brought cognizable discrimination claims under Titles VI and XI—based on their sex and race—and have suffered discrimination in the form of racialized sex stereotyping and workplace retaliation. The Court’s plenary review will reveal that under the appropriate legal standard, the district court erred in dismissing Respondents’ claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016).

First, Ms. Zhang’s hostile environment harassment claims can be premised on intersectional discrimination. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *see also Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020). The statutes’ plain meaning precludes individual discrimination based in any part on protected characteristics. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009). Legislative history buttresses this conclusion. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003); 110 CONG. REC. 1540 (1964). And other statutes which are interpreted in tandem with Titles VI and IX consistently recognize cognizable claims for intersectional discrimination. *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009).

Second, stereotyping constitutes harassment—a form of discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998); *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020). “Discrimination” is an inherently vague term. *Guardians Ass’n v. Civ. Serv.*

Comm'n of City of New York, 463 U.S. 582, 592 (1983). Thus, it is necessary to consider the legislative history of the statutes at issue and Congress's intent to protect against unspecified forms of discrimination. S. REP. NO. 94-882. Moreover, agencies charged with interpreting Titles VI and IX are entitled to *Chevron* deference in clarifying any ambiguity—these entities condemn stereotyping. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); Racial Incidents and Harassment Against Students at Educational Institutions, Investigative Guidance, 59 Fed. Reg. 11,448-01 (Mar. 10, 1994).

Affirmance is vital to public policy—federal courts are one of “the ‘*primary* and powerful reliances’ in protecting citizens against such discrimination.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 708 (1979) (emphasis in original). Accordingly, the Court should decline Petitioner’s invitation to dismantle civil rights’ protections and affirm.

[Section II Omitted]

ARGUMENT

Respondents respectfully request the Court bar Petitioner’s attempt to legalize discrimination and retaliation and affirm the judgment of the court of appeals. Respondents’ claims are cognizable under Title VI and Title IX.

At the outset, construction of civil rights’ laws is central to the Court’s inquiry. It is undisputed that such statutes are interpreted together in a consistent fashion. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (turning to Title VII in interpreting Title IX); *Fitzgerald*, 555 U.S. at 258 (“Congress modeled Title IX after Title VI . . . with the explicit understanding that it would be interpreted as Title VI was.”). Sound legal reasoning underscores interpreting Titles VI and IX in tandem—the purpose of both statutes is identical: “to avoid the use of federal resources to support discriminatory practices,” and “to provide individual citizens effective protection against those practices.” *Cannon*, 441 U.S. at 704. Accordingly, we presume that case law on one statute applies with equal force to similar provisions in the other statutes.⁴

I. RESPONDENTS PLEADED COGNIZABLE INTERSECTIONAL DISCRIMINATION CLAIMS UNDER BOTH TITLE VI AND TITLE IX BASED ON STEREOTYPING.

Respondents’ discrimination claims under Titles VI and IX are plausible based on their identity as non-white women. Petitioner challenges two portions of the statutory language in each relevant statute: (1) whether “on the basis” of a protected trait allows for combined discrimination; and (2) whether the term “discrimination” includes race-sex stereotyping. Pet. App. 9, 16. The legal authorities overwhelmingly show that these statutes preclude intersectional discrimination based on combined stereotypes. Therefore, Respondents’ discrimination claims must stand.

⁴ While Title VI uses “on the ground of race,” the Court has used this phrase synonymously with “basis” in its Title IX jurisprudence. *See supra* p. 1–2 (statutes); *see, e.g., Gratz v. Bollinger*, 539 U.S. 244, 279 (2003). The Court also used the phrases “because of” (in Title VII) and “based on” interchangeably throughout its decision in *Bostock*. 140 S. Ct. at 1737–38, 1743–45, 1753.

Under both statutes, a cognizable hostile environment claim exists when a plaintiff pleads facts supporting five elements.⁵ A school is liable for discrimination by a third-party when it exercises control over the offender and when the discrimination occurs “during school hours and on school grounds.” *Davis*, 526 U.S. at 644–46. Here, Petitioner is liable for its failure to protect Respondents from discrimination. Ms. Zhang was harassed at Tang University while classes were in session, and Petitioner acknowledged its ability to bar the offender from its school but instead chose money over the well-being of its students.⁶ Pet. App. 4–5. Accordingly, the court of appeals correctly held that Ms. Zhang pleaded cognizable claims for relief.⁷

A. Titles VI And IX Prohibit Intersectional Discrimination.

The plain language, Congressional intent, and related statutory schemes show that intersectional discrimination gives rise to colorable claims under Titles VI and IX. Ms. Zhang experienced discrimination based on her sex and race—a blatant form of proscribed discrimination. *Id.* at 4; *cf. Sewell*, 974 F.3d at 584 (recognizing claim for discrimination based on combination of race and sex). Accordingly, she is entitled to relief.

1. The Plain Language Of Titles VI And IX Proscribes Combined Discrimination.

On their face, Titles VI and IX bar discrimination premised on a person’s combined inherent traits. Statutory interpretation begins with the plain meaning; “when the statutory

⁵ The elements are: (1) membership in a protected class; (2) discrimination that is “severe, pervasive, and objectively offensive”; (3) deprivation of an educational benefit; (4) actual notice; and (5) deliberate indifference. *Davis*, 526 U.S. at 650 (1999); *accord Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032–33 (9th Cir. 1998) (race-based harassment).

⁶ Petitioner’s policy that it has “no responsibility” to protect students from outsiders does not shield it from liability. Pet. App. 9; *see Davis*, 526 U.S. at 644–45 (explaining that Title IX provides notice of liability for failing to address acts by third parties). Moreover, Petitioner does not dispute that Respondents’ pleading was insufficient as to any of the requisite elements.

⁷ Dr. Harjo’s cognizable claims for relief are discussed *infra*, Section II.

language is plain, [courts] must enforce it according to its terms.” *Jimenez*, 555 U.S. at 118.

Here, two portions of the statutory text are instructive. First, the plain meaning of “on the basis” shows that when the named characteristic is one underlying reason for discrimination, there is no requirement that it be the *only* reason. *See Basis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A fundamental principle; an underlying fact or condition; a foundation or starting point.”). In other words, discrimination “*at least in part* because of an [individual’s] sex” is still discrimination. *Chadwick*, 561 F.3d at 43 (emphasis in original). Indeed, when challenged on textual grounds, the phrase has been construed liberally by the Court. *See Jackson*, 544 U.S. at 178 (“the text of Title IX prohibits . . . retaliating against a person who speaks out against sex discrimination”).

Second, Titles VI and IX both proclaim that “no person” shall be “subjected to discrimination.” *See supra* p. 1–2 (statutes). A “person” is “a human being,” in the singular; thus, the focus is on the individual, not on the class. *Person*, BLACK’S LAW DICTIONARY; *see also Individual*, WEBSTER’S NEW INT’L DICTIONARY 1267 (2d ed. 1954) (“A particular being as distinguished from a class, species, or collection.”). Petitioner’s argument based on a “single form of discrimination” therefore misconstrues the statutes’ plain meaning. Pet. App. 16; *cf. Connecticut v. Teal*, 457 U.S. 440, 453–54 (1982) (explaining the focus in Title VII is the protection of the individual, and not of the minority group as a whole). Accordingly, it is improper to require that a cognizable discrimination claim be based solely on a single identity.

2. *Titles VI And IX Are Intended To Proscribe Any And All Discrimination Related To Enumerated Characteristics.*

While legislative history does not control, it bolsters the conclusion that Congress intended the statutes to protect “against other unspecified forms of discrimination.” Pet. App. 9; *see Desert Palace*, 539 U.S. at 101 (explaining where a statute’s plain meaning is clear, a court need not look behind it to discern legislative intent). This history confirms Congress’s focus on the individual.

See, e.g., 110 CONG. REC. 1540 (“This bill is designed for the protection of individuals.”). Elimination of all forms of discrimination is tantamount to Congress’s goal of ensuring that federal funds “are not used to support . . . discrimination.” *Id.* at 7062.

Next, Congress intended for Titles VI and IX to preclude “plus” claims, where discrimination is based on a protected trait plus an additional trait. Statutory language depends on context—this is used to infer Congress’s intent based on what it knew when it enacted a statute. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001). For example, in *Cannon*, the Court looked to contextual evidence in determining that a private cause of action existed under Title IX. *See* 441 U.S. at 696–98 (noting that Congress patterned Title IX after Title VI and intended to create the same remedies under both statutes). The Court reasoned that prior to 1972, in all “implied cause of action cases” involving the similarly worded Title VI, “a cause of action was found”; therefore, in using the same language in Title IX, Congress “expected its enactment to be interpreted in conformity with [Title VI].” *Id.* at 698 n.23, 699.

Here, Title IX was enacted in 1972, after Title VII was construed in 1971 to allow “plus” claims. *Phillips*, 400 U.S. at 544. Yet Congress used virtually identical language in Title IX. Equally persuasive is the fact that Congress “refused to adopt an amendment which would have added the word ‘solely’ to modify the word ‘sex’” when enacting Title VII because it would render the Act “totally nugatory.” *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (citing 110 CONG. REC. 2728, at 13,837). Congress presumably knew this case law, along with the practice of using Title VI to construe Title IX. With this information, Congress surely would have modified the language of either statute had it intended to restrict their scope.

Furthermore, the court of appeals correctly emphasized the problem of leaving Ms. Zhang “without a remedy under either statute.” Pet. App. 11; *see Cannon*, 441 U.S. at 709 (explaining

that doubts should be resolved in favor of providing a remedy for victims of discrimination). This compels the conclusion that the legislative goal of the statutes is ensuring the availability of private causes of action for any form of discrimination.

3. *Civil Rights’ Statutory Schemes Have Long Recognized Intersectional Discrimination Claims.*

Constitutional and statutory provisions confirm the availability of redress for intersectional claims. As noted above, Title VII plays a critical role in ascertaining the meaning of Titles VI and IX. Contrary to Petitioner’s assertion, Title VII unequivocally precludes discrimination against non-white women.⁸ Pet. App. 7. The Court first recognized “sex-plus” claims under Title VII when an employer discriminated against a subclass of women—those having preschool children. *Phillips*, 400 U.S. at 544.

The Title VII analysis applies equally to Titles VI and IX. To be sure, Title VII contains both race and sex on its face. But this is not dispositive. For example, the Court foreclosed discrimination under Title VII based on sex and parenting status, an unenumerated identity. *Id.*; *see also Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1048 (10th Cir. 2020) (holding that sex-plus-age claims are cognizable under Title VII). As in Title VII, Titles VI and IX outlaw discrimination based on a subclass of individuals within a protected class.

The Equal Protection Clause’s bar on “plus” claims is similarly instructive. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (holding that a statute that treats widowers less favorably than widows violates the Equal Protection Clause). When introducing the bill, Representative Celler explained that Title VI embodied principles of Equal Protection by “assur[ing] the existing right to equal treatment in the enjoyment of federal funds.” *Bakke*, 438

⁸ Petitioner seemingly concedes this point in not challenging Dr. Harjo’s Title VII discrimination claims based on non-white women. Pet. App. 11.

U.S. at 286 (quoting 110 CONG. REC. 1519) (emphasis in original). And the Court recognizes that discrimination that violates the Equal Protection Clause “also constitutes a violation of Title VI.” *Gratz*, 539 U.S. at 276 n.23. Thus, if the Equal Protection Clause foreclosed combined discrimination, *a fortiori* Title VI proscribes “race-plus” discrimination.

Moreover, the Equal Protection Clause can bar use of race as a *factor* in classification schemes. *See id.* at 270 (holding that using race as one factor in admissions—although other factors were considered—was based on race and violated Equal Protection). Accordingly, race-based discrimination under Title VI must be attributed—at least in part—to racial discrimination, but it can also include other types of discrimination. The converse holds true for sex-based discrimination under Title IX.

4. *Tang University’s Definition Of “Similarly Situated” Individuals Is Misplaced.*

Both the district court and Tang University “misunderstand the nature of the harassment” experienced by Ms. Zhang. Pet. App. 9. Tang University contends that if either male students (of any race) or non-Asian students (of any gender) experienced treatment similar to Ms. Zhang, she does not have a claim. *Id.* But the Court has never sanctioned this defense. *See Connecticut*, 457 U.S. at 455 (“It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group.”). Circuit courts have similarly called out the fallacy in Tang University’s reasoning, holding that what walks and sounds like a duck is indeed a duck. *See Jefferies*, 615 F.2d at 1032 (holding that discrimination against black females could exist “even in the absence of discrimination against black men or white women”). Tang University’s reliance on “males” and “non-Asian” students for comparison misconstrues the underpinnings of a “plus” claim—“not all members of a disfavored class are discriminated against.” *Chadwick*, 561 F.3d at

43. Discrimination against Asian women, in the absence of discrimination against Asian males or white females, is still a form of sex, and race, discrimination. Period.⁹

B. Respondents’ Discrimination Claims Are Plausible And Supported By Well-Pleaded Facts Of Combined Race-Gender Stereotyping.

Respondents alleged plausible discrimination claims premised on stereotyping. *See Iqbal*, 556 U.S. at 679 (“A complaint that states a plausible claim for relief survives a motion to dismiss.”). Accepting all alleged facts as true—as required in this procedural posture—the complaint showed a plausible “minimal inference of bias,” allowing the claims to move forward. *Columbia*, 831 F.3d at 56. First, the court of appeals took proper judicial notice of the “interconnection of racial-and gender-based stereotyping.” *See* Pet. App. 9 (citing *Cantalupo*, *supra* note 2). Courts routinely accept widely held stereotypes as fact through judicial notice. *See, e.g., Mandell v. County of Suffolk*, 316 F.3d 368, 378 (2d Cir. 2003) (taking judicial notice of the “demeaning ethnic stereotype that Jews are ‘cheap’”); *see also* FED. R. EVID. 201 (a court may notice a fact that “can be accurately and readily determined”). Next, in addition to stigmatizing comments, Ms. Zhang experienced stalking; this is sexual harassment. *See, e.g.,* Pet. App. 4 (recounting a text message “which alluded to Ms. Zhang’s Asian race and ethnicity in sexual terms”); *see also* 34 C.F.R. § 106.30 (defining sexual harassment).

In line with this recognized theory, Ms. Zhang’s well-pleaded facts were more than sufficient to sustain her discrimination claims. Sexual harassment by a teacher “‘discriminates on the basis of sex’ in violation of Title IX.” *Franklin*, 503 U.S. at 75. The fact that the harasser’s conduct was also based on racial stereotypes does not negate the claim; to the contrary, it births an additional claim under Title VI for racial discrimination. But it didn’t end there for Ms. Zhang.

⁹ Moreover, the panoply of cases cited by Petitioner are inapposite. *See* Pet. App. 16–17. Most cases were on summary judgment, after surviving dismissal, and none were based on the theory of intersectional discrimination.

As discussed *infra*, she encountered additional discrimination from the entity obligated by law to help her—her college. It is this sequence of events that breathes life into her claims.

I. Discrimination Is A Broad Term That Unquestionably Encompasses Stereotyping.

Congress’s intent to ban race and sex charged stereotyping is confirmed by agency interpretation. Harassment is a form of discrimination proscribed by both statutes—sexual harassment is barred by Title IX, and racialized harassment is likewise barred by Title VI. *See, e.g., Gebser*, 524 U.S. at 281; *Monteiro*, 158 F.3d at 1032–33 (citing 59 Fed. Reg. at 11,449). Harassment can take many different forms, including stereotyping. *See Chisholm v. St. Marys City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 351 (6th Cir. 2020) (explaining that harassment includes being “mistreated for failing to conform to traditional sex stereotypes”).

On their face, Titles VI and IX contain ambiguous language. *See Guardians*, 463 U.S. at 592 (“the word ‘discrimination’ is inherently [ambiguous]”). However, this ambiguity is intentional, serving as a “broadly written general prohibition on discrimination.” *Jackson*, 544 U.S. at 175; *see also Bakke*, 438 U.S. at 284 (“The language of [Title VI] . . . is majestic in its sweep.”). Fortunately, legislative and agency guidance is plentiful.

a) Congress Intended Titles VI And IX To Protect Against Unspecified Forms Of Discrimination.

Due to the statutes’ ambiguity on this front, it is necessary to discern Congressional intent in their enactment. *Desert Palace*, 539 U.S. at 101. For Title IX, the legislative history is replete with references to “sex stereotyping.” *See generally* S. REP. NO. 94-882 (using the phrase 17 times); H.R. REP. NO. 94-1701 (using the phrase 13 times). Congress was concerned with “overcoming sex stereotyping” in colleges. H.R. REP. NO. 94-1701, at 4914. Title VI tells a similar story; importantly, several commenters suggested proscribing “segregation or *other*

distinctions based on race or color.” H.R. REP. NO. 88-914, at 2425 (emphasis supplied). Moreover, the Court previously embraced Congress’s choice of broad language for civil rights’ statutes, stating that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

Again, comparison to sister statutes is also instructive, where courts have long recognized the role that negative preconceived notions play in discriminatory behavior. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610–11 (1993) (characterizing age discrimination as “based in large part on stereotypes unsupported by objective fact”); *see also Weinberger*, 420 U.S. at 653. And the Court endorsed claims founded on “sex-based” stereotyping in its most recent Title VII case. *Bostock*, 140 S. Ct. at 1741.

b) Agency Interpretation Confirms That Stereotyping Is Discrimination.

When statutory text is imprecise, the Court should defer to agency interpretation. *Chevron*, 467 U.S. at 843; *see also Monteiro*, 158 F.3d at 1033–34 (deferring to agency interpretation in finding claim for racial harassment under Title VI). Following Congress’s lead, agencies enforcing Titles VI and IX stress that “enumeration of specific forms of prohibited discrimination” in their regulations “does not limit the generality of the prohibition” in the statute. 34 C.F.R. § 100.3 (Title IX); *accord* 42 C.F.R. § 80.3 (Title VI).

Moreover, Titles VI and IX are interpreted as prohibiting discrimination in the form of stereotyping.¹⁰ The Office of Civil Rights has interpreted Title VI as prohibiting “discrimination

¹⁰ The EEOC also explicitly addressed Ms. Zhang’s experience in the Title VII context. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2006-1, SECTION 15 RACE AND COLOR DISCRIMINATION (2006) (quoting *Lam v. University of Hawaii*, 40 F.3d 1551, 1561–62 (9th Cir. 1994)) (“Title VII protects Asian American women from discrimination based on stereotypes and assumptions about them ‘even in the absence of discrimination against Asian American men or White women.’”).

against students of any religion when the discrimination involves stereotypes about people who share certain ancestral or ethnic characteristics.” Office of Civil Rights, Know Your Rights: Title VI and Religion Fact Sheet (Jan. 2017). Of note, Title VI does not expressly mention religion, yet the agency recognized that based on religion, people may be discriminated against for their perceived ethnic identity. Similarly, the Department of Education instructs that “the harassment need not be based on the ground of the complainant's or victim's race, so long as it is racially motivated.” 59 Fed. Reg. at 11,453. Unsurprisingly, Title IX garners the same interpretation: “Title IX protects students from all forms of sex discrimination, including discrimination based on sex stereotypes.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390-01, 41,397 (July 12, 2022).

Because the agencies’ interpretations do not conflict with Congressional intent, they are owed considerable deference. *Chevron*, 467 U.S. at 862. And given the unanimous consensus by agencies charged with enforcing these statutes, deference is especially warranted.

2. *Discrimination In The Form Of Racialized Sex Stereotypes Is Pervasive At Tang University And Must Not Continue.*

In addition to Angeli’s race-gender stereotyping, Ms. Zhang was subjected to the same discrimination by Tang University when it refused to assist her. The concept of “stereotyping” includes “subtle cognitive phenomena which can skew perceptions and judgments.” *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999).¹¹ Consistent with this research, Tang University’s actions constituted an official decision “not to remedy the violation.” *Gebser*, 524 U.S. at 290. In doing so, Tang University failed its “legal duty to take reasonable steps to

¹¹ Notably, unconscious bias is no defense and “is no more permissible than a decision influenced by conscious racism or sexism.” *Kimble v. Wisconsin Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 769 (E.D. Wis. 2010) (citing Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 771 (2005)).

eliminate” a hostile environment. 59 Fed. Reg. at 11,450.

Recall that Mitchell interrogated Ms. Zhang as to her use of the day spa and insisted on direct proof of her harassment. Pet. App. 5. These actions by a university official during the disciplinary process raise a plausible inference of gender bias. *Columbia*, 831 F.3d at 57. As in *Columbia*, Ms. Zhang pleaded facts that “if true, gives plausible support to the proposition that [Petitioner was] motivated by bias in discharging [its] responsibilities to fairly investigate and adjudicate the dispute.” *Id.* To survive dismissal, this is all that is required.

3. *Civil Rights’ Statutes Must Evolve Over Time To Protect Public Interest.*

Discrimination is a word that “may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Thus, it is no coincidence that much of civil rights’ jurisprudence comes from judicially-created doctrine—it must keep up with the changing times.¹² And the Court has recognized as much in the context of Titles VI and IX. *See Cannon*, 441 U.S. at 716 (emphasis in original) (noting Congress relies on “courts to *decide* whether there should be a private right of action, rather than determining this question for itself”).

The hostile environment framework developed in response to covert forms of discrimination that surfaced after explicit forms were outlawed. DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 19–22 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003). To that end, recognizing Respondents’ claims “best effectuates congressional intent to prohibit discrimination based on stereotypes.” *Frappied*, 966 F.3d at 1049. Accordingly, against the backdrop of intersectional discrimination, claims based on race-gender stereotyping must survive.

¹² In fact, such a regime is common in statutory schemes enacted to protect the public interest. *See, e.g., Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 776 (1984) (discussing judicially-created antitrust law doctrines).

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[Section II Omitted]

CONCLUSION

Respondents respectfully request the Court affirm the judgment of the court of appeals and remand the case back to the district court.

Respectfully Submitted,

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WRITING SAMPLE

HIGH TECHNOLOGY LAW JOURNAL CASE COMMENT

Federal Circuit Declines To Find Patent Claims Indefinite For Broad Descriptive Words

I wrote the attached Case Comment in July 2022, in my capacity as Editor-in-Chief on the High Technology Law Journal. I conducted the legal research and wrote the Comment myself. I did not receive any feedback or editing for revisions. Although the Comment will be edited for publication in the Journal, this copy is the preprint version, and the work is entirely my own. The Comment will be published later this year.

The Comment discusses the Federal Circuit's recent ruling on definiteness for claims using terms of degree. It also highlights a procedural issue concerning the law of the regional circuit and the Federal Rules of Civil Procedure. In addition to patent law, I am very interested in civil procedure and how it shapes litigation practice.

***Federal Circuit Declines To Find Patent Claims Indefinite For Broad Descriptive Words
(And An Ode To 1L Civil Procedure)***

Niazi Licensing Corporation v. St. Jude Medical S.C., Inc.,
30 F.4th 1339 (Fed. Cir. 2022)♦

In a recent decision, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) handed down a ruling on the definiteness prong of patentability.¹ While the case tackled multiple issues on appeal, this Comment primarily focuses on two: whether claims are invalid for use of descriptive words or terms of degree, and whether sanctions are appropriate for failing to disclose predicate facts during discovery.² First, the panel unanimously disagreed with the district court’s analysis of claims containing two descriptive terms, “resilient” and “pliable,” and reversed the judgment holding claims indefinite for use of these terms.³ Ultimately, while the disputed terms were broad, they were not uncertain to a skilled artisan and did not amount to purely subjective terms that changed with a person’s opinion.⁴ Next, while the panel upheld the district court’s order of sanctions, Niazi missed an opportunity to have the panel weigh in on the appropriate test for exclusion of previously undisclosed evidence.⁵ This outcome is an important reminder that procedural posture can have a ripple effect on downstream infringement claims.⁶

I. Factual And Procedural Background

Plaintiff-Appellant Niazi Licensing Corporation (“Niazi”) is the owner of U.S. Patent No. 6,638,268 (the “’268 patent”), titled “Catheter to Cannulate the Coronary Sinus.”⁷ Defendant-Appellee St. Jude Medical S.C., Inc. (“St. Jude”) manufactures and sells medical devices, including a “telescoping catheter system” (the accused product).⁸ The ’268 patent is directed to resynchronization therapy—a method of treating heart failure that uses electrical leads to keep both sides of the heart consistently contracting together.⁹ The invention improves this therapy through the use of a double catheter—comprising an outer and inner catheter—that makes it easier to pass a lead into the veins of the heart.¹⁰

Claim 1 is directed to an apparatus and is representative of the claims on appeal for indefiniteness; the claim recites, in relevant part:

1. A double catheter, comprising:
an outer, *resilient* catheter having shape memory . . . ;

♦ By Janelle Barbier, J.D. Candidate, Santa Clara University School of Law, 2023. I am forever grateful to my 1L civil procedure professor, Marina Hsieh, for my love of procedure. ©2022 Janelle Barbier.

¹ See *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, 30 F.4th 1339, 1346 (Fed. Cir. 2022). Under the definiteness requirement, patent claims must particularly point out and distinctly claim the subject matter regarded as the invention. See 35 U.S.C. § 112 ¶2. The ’268 patent was issued in 2003 and is governed by the pre-AIA regime.

² See *Niazi*, 30 F.4th at 1346–47.

³ Judge Bryson, Judge Stoll, and Judge Taranto sat on the three-judge panel. See *id.* at 1342, 1346.

⁴ See *id.* at 1349–50.

⁵ See *id.* at 1354.

⁶ An analysis of how the procedural question could have affected Niazi’s claim of infringement is discussed *infra*, Section III.

⁷ *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, 311 F. Supp. 3d 1078, 1079 (D. Minn. 2018).

⁸ *Id.*

⁹ *Niazi*, 30 F.4th at 1343.

¹⁰ *Id.* (citing ’268 patent Abstract).

an inner, *pliable* catheter slidably disposed in the outer catheter¹¹

Claim 13—dependent on claim 1—further defines the outer catheter as having “sufficient stiffness”; other dependent claims provide exemplary resilient materials for constructing the outer catheter, such as “braided silastic.”¹²

The specification describes the outer catheter as having “sufficient shape memory to return to its original shape when undistorted” and a “braided design,” with resilience providing for “torque control and stiffness.”¹³ It also provides examples of materials that can be used to make the inner catheter, such as silicone; it further explains that the inner layer lacks longitudinal braiding, making it flexible, and that it is more flexible than the outer catheter.¹⁴

Claim 11 survived the invalidity challenge and is directed to a method of using the double catheter to place a lead in the coronary sinus vein.¹⁵ The claim recites, in relevant part:

11. A method . . . using a double catheter . . . comprising:
inserting the catheter into the coronary sinus;
advancing a guide wire through the catheter into a coronary sinus lateral branch vein;
advancing the inner catheter out of a front end opening of the outer catheter along the guide wire into the branch vein¹⁶

Niazi alleged that St. Jude’s products directly infringed the ’268 patent and that St. Jude’s instructions for use (“IFU”) induced its customers, mainly doctors, to infringe when performing resynchronization therapy.¹⁷ To support its allegations, Niazi submitted an expert report from its technical expert, Dr. Martin Burke, stating that Dr. Burke himself had directly infringed claim 11 when using St. Jude’s products.¹⁸

In 2017, Niazi sued St. Jude for direct and indirect patent infringement in the District of Minnesota.¹⁹ St. Jude’s claims for induced, contributory, and willful infringement all survived motions for dismissal; the claim for direct infringement was not challenged at this stage.²⁰ On cross-motions for summary judgment, the district court held that all but one of the asserted claims of the ’268 patent were indefinite—on the lone claim that survived, summary judgment of noninfringement was entered following resolution of evidentiary motions.²¹ As to direct infringement, the district court found that St. Jude’s instructions for use (“IFU”) did not direct

¹¹ *Id.* (citing ’268 patent col. 6 l. 62–col. 7 l. 9) (emphases added to disputed limitation).

¹² *Id.* at 1349 (citing ’268 patent col. 8 ll. 13–27, 33–34).

¹³ *Id.* (citing ’268 patent col. 4 ll. 21–23, col. 5 ll. 4–6, col. 3 ll. 11–13).

¹⁴ *Id.* (citing ’268 patent col. 3 ll. 13–15, col. 5 ll. 13–18).

¹⁵ *Niazi*, 30 F.4th at 1344.

¹⁶ *Id.* at 1343–44 (citing ’268 patent col. 7 l. 63–col. 8 l. 9) (emphases added to disputed limitation).

¹⁷ *Id.* at 1344–45.

¹⁸ *Id.* at 1344.

¹⁹ *See id.* at 1342, 1344; *see also Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, No. 17-CV-5096, 2021 WL 4947712, at *1 (D. Minn. Oct. 25, 2021).

²⁰ *See Niazi*, 311 F. Supp. 3d at 1079.

²¹ *Niazi*, 30 F.4th at 1344–45 (citing *Niazi Licensing Corp. v. Bos. Sci. Corp.*, No. 17-CV-5094, 2019 WL 5304922, at *5–7 (D. Minn. Oct. 21, 2019), *aff’d in part, rev’d in part and remanded sub nom. Niazi*, 30 F.4th 1339 (district court’s ruling on indefiniteness); *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, No. 17-CV-5096, 2021 WL 1111074, at *8 (D. Minn. Mar. 23, 2021) (district court’s ruling on infringement)).

users to complete steps in the same order required by claim 11.²²

During pre-trial proceedings in the district court, St. Jude moved to strike portions of Dr. Burke's expert report on the basis that the report relied on facts not disclosed during discovery and that Niazi had not identified Dr. Burke as a potential fact witness.²³ The district court agreed with St. Jude, excluding the evidence under Rule 37 and precluding Dr. Burke from testifying as a fact witness.²⁴ The district court also assessed monetary sanctions against Niazi for failing to disclose predicate facts during discovery and excluded portions of its damages expert report as unreliable.²⁵

The Federal Circuit affirmed each of the district court's rulings, except on invalidity—the panel reversed the judgment on indefiniteness and remanded the case to determine the issue of infringement and to assess St. Jude's remaining invalidity defenses.²⁶

II. Legal Analysis And Conclusion

Niazi brought four issues on appeal. First, it challenged the district's court's determination that the terms “resilient” and “pliable” rendered all but one claim indefinite.²⁷ Because all apparatus claims were invalidated for indefiniteness, Niazi could only pursue an indirect infringement claim for its remaining method claim.²⁸ Second, it contested the district court's ruling on induced infringement of Claim 11—the only claim to survive summary judgment—and disagreed that the elements of direct infringement and specific intent to encourage infringement were not proven.²⁹ Third, Niazi argued that the district court abused its discretion in assessing monetary sanctions and attorney fees against it, as well as excluding evidence that it submitted, for repeatedly failing to disclose facts during discovery.³⁰ Finally, Niazi disputed that its damages expert report was unreliable and speculative due to failure of its expert to apportion damages when calculating the royalty base.³¹

Writing for the panel, Judge Stoll first addressed the issue of definiteness—a statutory requirement under 35 U.S.C. § 112—by laying out the *Nautilus* standard.³² This requirement serves the important policy goal of providing notice to the public of what is claimed and “mandates clarity, while recognizing that absolute precision is unattainable.”³³ When a patentee uses descriptive words or terms of degree in claim language, the key inquiry is whether the language provides objective boundaries to a skilled artisan when read in context of the invention.³⁴ And “a

²² *Id.* at 1345.

²³ *Id.* at 1344.

²⁴ *Id.* at 1344–45. “Rule 37” refers to Federal Rule of Civil Procedure 37 in this Comment.

²⁵ *Id.* at 1344 (citing *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, No. 17-CV-5096, 2020 WL 1617879, at *1–3 (D. Minn. Apr. 2, 2020) (district court's ruling on sanctions); *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, No. 17-CV-5096, 2020 WL 5512507, at *9–11 (D. Minn. Sept. 14, 2020) (district court's ruling on damages report)).

²⁶ *See id.* at 1342–43.

²⁷ *Niazi*, 30 F.4th at 1344.

²⁸ “As a result of the various exclusion orders (and a ruling on inadmissibility of certain evidence that is not challenged on appeal), Niazi's infringement case rested on St. Jude's IFU for its CPS catheter.” *Id.* at 1345.

²⁹ *Id.* at 1345.

³⁰ *Id.* at 1353–56.

³¹ *Id.* at 1356–57.

³² *See id.* at 1346 (citing *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014)) (“A claim is indefinite only if, when ‘read in light of the specification’ and ‘prosecution history,’ it ‘fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.’”).

³³ *Niazi*, 30 F.4th at 1346 (citing *Nautilus*, 572 U.S. at 910).

³⁴ *Id.* at 1347.

claim is not indefinite just because it is broad.”³⁵

Next, the panel recounted cases where the Federal Circuit decided the definiteness of descriptive words and terms of degree in claim language. Starting with cases where terms of degree were found to meet the definiteness standard, two cases were instructive.³⁶ First, the phrase “visually negligible,” in a claim element of a graphical indicator, was defined by the claim language itself—“whether it could be seen by the normal human eye.”³⁷ The prosecution history was also highly relevant; both the examiner and the parties’ experts understood the meaning of the phrase.³⁸ Second, the term “not interfering substantially” was definite due to the specification and prosecution history providing examples with which a skilled artisan could compare an accused product to.³⁹

Turning to cases where terms of degree rendered claims indefinite, the predominant theme was that the intrinsic and extrinsic evidence “provided insufficient guidance as to any objective boundaries for the claims.”⁴⁰ The panel started with a classic example of a purely subjective term: “aesthetically pleasing.”⁴¹ In that case, nothing in the record supplied a standard for measuring the scope of the phrase—the scope changed depending on a person’s subjective determination.⁴² Similarly, the term “QoS requirements” was indefinite because it was defined by what characteristic was most important to a user, making it dependent “on the unpredictable vagaries of any one person’s opinion.”⁴³ In sum, the scope of a claim cannot be determined with reasonable certainty when it employs purely subjective terms.⁴⁴

As indefiniteness is reviewed *de novo*, the panel concluded by reviewing the evidence presented in the district court.⁴⁵ The intrinsic evidence, of the claim language read in light of the specification, was enough to resolve the issue.⁴⁶ Claim 1’s language conveyed that the resilient outer catheter must have “shape memory.”⁴⁷ And the written description provided exemplary materials for each catheter.⁴⁸ The panel found St. Jude’s reliance on a single sentence in the written description unpersuasive because the specification explained that each catheter must have degrees of stiffness and flexibility that were relative to each other.⁴⁹ Therefore, the claim terms at issue

³⁵ *Id.*

³⁶ *See id.* at 1347–48.

³⁷ *Id.* (citing *Sonix Tech. Co. v. Publ’ns Int’l, Ltd.*, 844 F.3d 1370, 1371–73, 1378 (Fed. Cir. 2017)).

³⁸ *Id.* at 1348.

³⁹ In the disputed claim language, the term “not interfering substantially” applied to a chemical compound’s ability to associate with a nucleic acid, based on interference caused by a linkage group. *Niazi*, 30 F.4th at 1348 (citing *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1329, 1334–35 (Fed. Cir. 2010)).

⁴⁰ *See id.*

⁴¹ *See id.* (citing *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1345, 1349–56 (Fed. Cir. 2005)).

⁴² *Id.*

⁴³ *Id.* (citing *Intellectual Ventures I, LLC v. T-Mobile USA, Inc.*, 902 F.3d 1372, 1375–76, 1381–82 (Fed. Cir. 2018)).

⁴⁴ The Federal Circuit “drew a similar conclusion as to the claim phrase ‘unobtrusive manner that does not distract the viewer.’” *Id.* (citing *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371–74 (Fed. Cir. 2014)).

⁴⁵ *See Niazi*, 30 F.4th at 1345 (“Definiteness is a question of law that we review *de novo*.”), 1349.

⁴⁶ *See id.* at 1349.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ St. Jude argued that *Niazi* was inconsistent in its description of the terms at issue, pointing to a sentence in the written description that stated that both catheters “preferably have a predetermined shape and a certain degree of stiffness to maintain such shape . . . but still flexible enough to bend when required.” The panel responded that “the outer catheter has a greater degree of stiffness and less flexibility compared to the inner catheter.” *See id.* at 1350 (citing *Niazi*, 2019 WL 5304922, at *6).

were not “purely subjective terms” and did not give rise to variable claim scope “depending on the particular eye of any one observer.”⁵⁰ In other words, taken as a whole, the intrinsic record provided a standard for measuring the scope of the terms.⁵¹

Moreover, the extrinsic evidence of dictionary definitions buttressed the panel’s conclusion on definiteness, illustrating that the plain language would have understood meanings by skilled artisans.⁵² The panel held that the claims using the terms “resilient” and “pliable” were not indefinite because the “terms, when read in light of the intrinsic and extrinsic evidence, inform those skilled in the art about the scope of the invention with reasonable certainty.”⁵³

Moving to the issue of infringement on claim 11, the panel began with the first part of an infringement analysis: claim construction.⁵⁴ The panel agreed with the district court that “St. Jude’s IFUs recite the steps required by claim 11 in an order opposite to that required by claim 11 (as construed)”;⁵⁵ thus, direct infringement could not be proven.⁵⁵ Because an essential element of indirect infringement was lacking, the panel declined to reach the issue of whether Niazi presented evidence that St. Jude acted with the requisite specific intent to support the claim.⁵⁶

The remaining issues were reviewed under an abuse of discretion standard.⁵⁷ In sum, the panel concluded that the court did not abuse its discretion in any of its decisions regarding the evidentiary motions and sanctions.⁵⁸

But hiding in this pile of motions was an interesting question on civil procedure: whether the Eighth Circuit’s four-factor test for exclusion of previously undisclosed evidence had survived Rule 37’s enactment.⁵⁹ Consistent with Federal Circuit precedent, the panel reviewed the district court’s decision to issue sanctions under Rule 37 under the law of the Eighth Circuit, which employs an abuse of discretion standard.⁶⁰ Niazi argued that the district court abused its discretion in applying the four-factor test.⁶¹ However, as the panel pointed out, the district court did not rely on the four factors; instead, it analyzed whether Niazi’s failures were “substantially justified or harmless” under Rule 37(c)(1).⁶² And because Niazi did not challenge the actual basis for the district court’s conclusion—nor the court’s determination that it need not consider the four-factor test—the Federal Circuit declined to reweigh the factors on appeal.⁶³

Moreover, even assuming, without deciding, that the four-factor test was controlling, the panel found that Niazi had not identified a legal or factual error in the district court’s decision not to analyze the factors.⁶⁴ Because of this omission by Niazi, the panel affirmed the district court’s

⁵⁰ *Id.* at 1349–50.

⁵¹ *Niazi*, 30 F.4th at 1349.

⁵² *See id.* at 1350 (quoting Dictionary.com) (explaining that “‘resilient’ is defined as ‘returning to the original form or position after being bent, compressed, or stretched’” and that “‘pliable’ [] is defined as ‘easily bent, flexible, supple’”).

⁵³ *See id.*

⁵⁴ *See id.* at 1350–53.

⁵⁵ *See id.* at 1353.

⁵⁶ *See id.* at 1351.

⁵⁷ *See Niazi*, 30 F.4th at 1353, 1356.

⁵⁸ *See id.* at 1353, 1355, 1358.

⁵⁹ *See id.* at 1354 n.4.

⁶⁰ *See id.* at 1353 (citing *Transclean Corp. v. Bridgewood Servs., Inc.*, 290 F.3d 1364, 1370–71 (Fed. Cir. 2002); *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 702 (8th Cir. 2018)).

⁶¹ *Id.* at 1354.

⁶² *See id.* The district court relied on the principles articulated in *Vanderberg v. Petco*, discussed *infra*. *See Niazi*, 2020 WL 1617879, at *2.

⁶³ *See Niazi*, 30 F.4th at 1354 n.4.

⁶⁴ *See id.*

rulings without reaching the procedural question.⁶⁵

III. Discussion

There are two important takeaways from this case. First, the case summarizes nicely what to do—and what not to do—to avoid an indefiniteness holding when drafting claims with terms of degree. If possible, define the terms in the claim language itself. In the case of “resilient,” for example, the term could almost be seen as superfluous, given that its definition was contained in the same claim. Recall that claim 1 recited “a resilient catheter having shape memory.”⁶⁶ And the dictionary definition provided by the Federal Circuit specified that “resilient” meant “returning to its original form or position after being [manipulated].”⁶⁷ Thus, “resilient” likely could have stood on its own because its standard definition mirrored that intended by the claim language. This point is illustrated in the term “pliable” being defined by its plain and ordinary meaning despite that term standing alone in the claim language.

In addition to clear claim language, use the specification to resolve any doubts of ambiguity. Providing examples gives a person skilled in the art a reference point for which to compare accused products and allows that person to opine on claim scope with reasonable certainty, as required under *Nautilus*. A patent’s written description can also be used to compare claim elements—it is not necessary to venture outside the invention as comparing elements within a claim can provide a reference range. Utilizing the specification in this manner provides the objective standard with which to measure a claim’s scope by—the gold standard in an indefiniteness analysis.⁶⁸ Finally, dictionary definitions can bolster the interpretation of claim language, especially when the meaning ascribed by a patent owner aligns with the plain and ordinary meaning of the term in everyday use.

A Note For Civil Procedure Nerds

Finally, the case is a reminder that it is important to preserve, and articulate, objections based on civil procedure as much as with issues concerning substantive patent law. This is especially salient under the deferential abuse of discretion standard.⁶⁹ The remainder of this Comment analyzes the procedural question alluded to by the Federal Circuit—whether the Eighth Circuit’s common law tests remain viable in light of Rule 37—and whether preserving the issue for appeal would have changed the outcome for Niazi. On appeal, Niazi would need to show two things to prevail: (1) the district court abused its discretion; and (2) that error resulted in prejudice to Niazi.⁷⁰

⁶⁵ See *id.* at 1354.

⁶⁶ See *id.* at 1343 (citing ’268 patent col. 6 l. 62–col. 7 l. 9).

⁶⁷ See *id.* at 1350.

⁶⁸ Indeed, the Federal Circuit has repeatedly referred to the need to define a claim’s “objective boundaries.” See, e.g., *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1364 (Fed. Cir. 2018) (finding claims indefinite for use of the term “minimal redundancy” because they lacked objective boundaries); *Guangdong Alison Hi-Tech Co. v. Int’l Trade Comm’n*, 936 F.3d 1353, 1360 (Fed. Cir. 2019) (finding claims definite because the written description provided objective boundaries for the claim term “lofty . . . batting”).

⁶⁹ “The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.” *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (explaining that the record supported the district court’s decision to issue sanctions under Rule 37).

⁷⁰ See *Wegener v. Johnson*, 527 F.3d 687, 690 (8th Cir. 2008) (explaining that even if a district court abuses its discretion, the appellant must also show that affirming the error would result in “fundamental unfairness”); see also

As a threshold matter, for procedural issues that are not intertwined with substantive patent law, the law of the regional circuit governs.⁷¹ In addition, this issue presents a classic preemption question on whose rules control procedure in federal court. At first blush, the *Erie* doctrine may come to mind; law students and practitioners alike will almost certainly recall this doctrine which permeates much of the civil procedure curriculum.⁷² As a refresher, *Erie* says that federal courts must apply state substantive law and federal procedural law when sitting in diversity.⁷³

True, this is not a diversity case. But as commentators have pointed out, “in instances in which the relevant regional circuit has not addressed the particular procedural issue before the Federal Circuit,” the court’s choice of law process “strikingly resembles the methodology federal courts undertake” when applying the *Erie* doctrine.⁷⁴ In this situation, the court seeks to step into the shoes of the regional circuit.⁷⁵ Moreover, when it comes to interpreting the Federal Rules of Civil Procedure, the Federal Circuit has indicated that generally, it defers to the regional circuit.⁷⁶ And the court has previously addressed Rule 37 in a panoply of cases.⁷⁷

Armed with this choice of law framework, we can analyze the facts in this case. When determining whether to exclude previously undisclosed evidence, the Eighth Circuit has traditionally relied on two different tests.⁷⁸ Niazi focused on one of the tests which consists of four factors.⁷⁹ The second test used by the Eighth Circuit also consists of four factors.⁸⁰ Under such tests, application of the factors is “within the sound discretion of the district court.”⁸¹

Petrone v. Werner Enterprises, Inc., 940 F.3d 425, 436 (8th Cir. 2019) (“Notwithstanding the district court’s error, we will affirm unless Defendants can show the error was not harmless.”).

⁷¹ The Federal Circuit “review[s] procedural matters, that are not unique to patent issues, under the law of the particular regional circuit court where appeals from the district court would normally lie.” See *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574–75 (Fed. Cir. 1984).

⁷² The *Erie* doctrine originated from *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁷³ See *id.* at 78 (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”), 92 (Reed, J., concurring in part) (“no one doubts federal power over procedure”).

⁷⁴ See Jennifer E. Sturiale, *A Balanced Consideration of the Federal Circuit’s Choice-of-Law Rule*, 2020 UTAH L. REV. 475, 487 (2020).

⁷⁵ See *id.* (citing *Panduit*, 744 F.2d at 1575) (explaining that the Federal Circuit seeks to “predict how that regional circuit would have decided the issue in light of the decisions of that circuit’s various district courts, [and] public policy”). The court also considers “whether there is a consensus among the regional circuits, the need to promote uniformity in patent law, and the nature of the legal issue involved”—it generally conforms its law “to that of the regional circuits when there exists expressed uniformity among the circuits.” *Id.* at 490 (citing *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1181 (Fed. Cir. 1996)).

⁷⁶ However, deference to regional circuit law is inappropriate in some cases. See *Manildra*, 76 F.3d at 1181–82.

⁷⁷ See *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 857 n.10 (Fed. Cir. 1991) (collecting cases) (describing cases where the Federal Circuit reviewed district courts’ application of Rule 37).

⁷⁸ See *Marti v. City of Maplewood, Mo.*, 57 F.3d 680, 683 (8th Cir. 1995) (“Two similar tests, or sets of factors, have been used by this court to determine whether a witness’s testimony should be excluded if that witness was not named in the pretrial order.”).

⁷⁹ See *Niazi*, 30 F.4th at 1354. The factors are: “(1) the reason the party fails to name the witness; (2) the importance of the testimony; (3) the amount of time the opposing party needs to properly prepare for the testimony; and (4) whether a continuance would in some way be useful.” *Citizens Bank of Batesville, Arkansas v. Ford Motor Co.*, 16 F.3d 965, 966–67 (8th Cir. 1994).

⁸⁰ The factors are: “(1) the prejudice or surprise in fact of the party against whom the excluded witness would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or willfulness of the party failing to comply with the court’s order.” *Marti*, 57 F.3d at 683 (citing *Morfeld v. Kehm*, 803 F.2d 1452, 1455 (8th Cir.1986)).

⁸¹ *Niazi*, 30 F.4th at 1354 n.4 (citing *Citizens*, 16 F.3d at 967).

Apart from these common law tests, the Federal Rules of Civil Procedure—under Rule 37—allow for “a self-executing sanction for failure to make a disclosure required by Rule 26(a).”⁸² The Eighth Circuit has summarized Rule 37 by explaining that if a party does not satisfy the disclosure requirements, “the undisclosed information or expert is excluded unless the failure was substantially justified or harmless.”⁸³ District courts in the Eighth Circuit are split on whether Rule 37 mandates exclusion when an exception does not apply—the appellate court has not opined on this question.⁸⁴

Here, the district court explained that the Eighth Circuit has been silent on whether a common law test has survived Rule 37’s enactment, going so far as to state that “contrary to [Niazi]’s argument, there is no such four-factor test.”⁸⁵ Although the Eighth Circuit has explained that it is not error for district courts to consider this balancing test in evaluating the admissibility of undisclosed evidence, the district court reasoned that the circuit’s opinion predated the effective date of Rule 37.⁸⁶ The district court went on to cite an Eighth Circuit case that referred to a mixture of factors taken from both tests, explaining that the factors apply when fashioning an alternative to Rule 37’s exclusion sanction, but *only* upon motion from the aggrieved party.⁸⁷

At the heart of the issue is whether Rule 37(c) mandates exclusion. But even assuming, *arguendo*, that Rule 37’s exclusion sanction is compulsory, there is still a question of whether the Rule applies in a particular case. A review of recent Eighth Circuit cases reveals that the circuit still considers the factors enumerated in its precedential cases. For example, in *Wegener v. Johnson* (cited to by the district court), the appellate court looked at the importance of the evidence and the effect that its admission would have on scheduling.⁸⁸ This compels the conclusion that—if Rule 37 must be imposed for disclosure failures that are not harmless nor substantially justified—the tests are alive and well. In other words, the circuit observes both Rule 37 and its common law precedent—it applies its common law factors to decide whether a failure to disclose evidence

⁸² FED. R. CIV. P. 37(c) advisory committee’s note to 1993 amendment.

⁸³ See *Vanderberg*, 906 F.3d at 702–03.

⁸⁴ *Id.* at 703 n.3.

⁸⁵ See *Niazi*, 2020 WL 1617879, at *2.

⁸⁶ See *id.* at *2 n.2 (citing *Carmody v. Kansas City Bd. of Police Comm’rs*, 713 F.3d 401, 405 (8th Cir. 2013)). Rule 37 was first enacted in 1937. Presumably, the district court was referring to the FRCP’s most recent amendment which occurred in 2015. However, Rule 37(c)(1) was not changed in 2015. This alone may be sufficient proof that the Eighth Circuit has not discarded its factored analysis. See FED. R. CIV. P. 37 advisory committee’s note to 2015 amendment; see also J. Ben Segarra, *2015 Amendments to the Federal Rules of Civil Procedure*, AM. BAR ASS’N PRAC. POINTS (Jan. 23, 2017).

⁸⁷ See *Niazi*, 2020 WL 1617879, at *2 n.2 (citing *Wegener*, 527 F.3d at 692) (explaining that courts should consider “the reason for noncompliance, the surprise and prejudice to the opposing party, the extent to which allowing the information or testimony would disrupt the order and efficiency of the trial, and the importance of the information or testimony”). Whether *Niazi* was required to file a motion to request an alternative sanction is outside the scope of this Comment and is separate from the purported misapplication of the four-factor test. However, the Eighth Circuit has said that “[w]here a party fails to make a timely disclosure, Federal Rule of Civil Procedure 37(c)(1) provides the district court with the authority to exclude the late-disclosed materials or to fashion a lesser penalty than total exclusion.” *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 771 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2551 (2021).

⁸⁸ See 527 F.3d at 692 (“a continuance would have postponed a much-delayed trial, and the testimony was offered to prove a point upon which a substantial amount of other evidence was presented to the jury”); see also *Hillesheim v. Holiday Stationstores, Inc.*, 903 F.3d 786, 790 (8th Cir. 2018) (assessing surprise to the opposing party and the usefulness of a continuance); *Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1204 (8th Cir. 2015) (finding that the opposing party failed to demonstrate surprise); *Doe v. Young*, 664 F.3d 727, 735–36 (8th Cir. 2011) (explaining that a continuance is more appropriate than exclusion to cure unfair surprise); *Davis v. U.S. Bancorp*, 383 F.3d 761, 765 (8th Cir. 2004) (agreeing with the district court that there was no unfair surprise to the opposing party).

was harmless or substantially justified.⁸⁹

This brings us to the million-dollar question—would a proper objection by Niazi have made a difference? The Eighth Circuit makes clear that if a district court errs in its legal conclusion, it abused its discretion.⁹⁰ As explained above, concluding that the factored tests were dead was likely legal error. In fact, the Federal Circuit touched on this oversight.⁹¹ But Niazi could not rely solely on the district court’s error—it would also need to show that affirming the error would result in “fundamental unfairness.”⁹²

Niazi likely could have demonstrated resulting prejudice from the district court’s refusal to analyze the appropriateness of sanctions under the factored tests. Notably, the Eighth Circuit’s factors weigh the harm caused to each party by excluding or admitting the evidence.⁹³ By not using this approach, the district court focused mainly on the harm that would result to St. Jude if Niazi’s evidence was admitted.⁹⁴ However, as described below, the harm to Niazi resulting from *not* admitting the evidence was arguably greater.

Niazi could have taken aim at the district court’s ruling by showing that the excluded evidence had strong probative value.⁹⁵ In that sense, its exclusion was not harmless—at least not to Niazi. At the Federal Circuit, Niazi argued that “St. Jude admits that Dr. Burke’s testimony as a direct infringer was important, which weighs against exclusion.”⁹⁶ Indeed, the Eighth Circuit has placed great weight on the importance of evidence targeted for exclusion.⁹⁷ Furthermore, the circuit instructs that “[w]here the exclusion of evidence is tantamount to dismissal, a district court may need to first consider the possibility of lesser sanctions.”⁹⁸

Given that Dr. Burke’s testimony was integral—perhaps even tantamount—to Niazi’s success on the merits of its infringement claim, its exclusion surely prejudiced Niazi.⁹⁹ And because the Federal Circuit would seek to resolve the issue by predicting how the Eighth Circuit would decide the issue, the importance of this testimony would weigh strongly against exclusion.¹⁰⁰ The matter became even more critical because Niazi succeeded in obtaining a

⁸⁹ Interestingly, the magistrate judge (whose exclusion order was adopted by the district court) relied on an opinion that used this exact framework, albeit from a district court in a different appellate jurisdiction. See *Dedmon v. Cont’l Airlines, Inc.*, No. 13-CV-0005-WJM-NYW, 2015 WL 4639737, at *1–5 (D. Colo. Aug. 5, 2015).

⁹⁰ See *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970 (8th Cir. 2012) (“A district court abuses its discretion when it applies an incorrect legal standard[.]”). While a district court has discretion over evidentiary rulings, the Eighth Circuit exercises de novo review over “whether the district court applied the correct legal standard in exercising that discretion[.]” See *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 714 (8th Cir. 2008).

⁹¹ See *Niazi*, 30 F.4th at 1354 n.4 (“Niazi does not challenge the district court’s legal determination that it need not consider these factors.”).

⁹² See *Wegener*, 527 F.3d at 690. It is possible that the Eighth Circuit would view exclusion of evidence, based on “an erroneous view of the law,” as giving rise to fundamental unfairness. See *Davis*, 383 F.3d at 765.

⁹³ Indeed, the Eighth Circuit has referred to the four-factor test as a “balancing test.” See *Carmody*, 713 F.3d at 405.

⁹⁴ See *Niazi*, 2020 WL 1617879, at *3 (“NLC’s failure to timely produce such discovery evidence is not harmless simply because any prejudice can be remedied by a continuance and additional depositions”).

⁹⁵ See *Wegener*, 527 F.3d at 694.

⁹⁶ See Reply Brief of Plaintiff at *23, *Niazi*, 30 F.4th 1339 (No. 2021-1864).

⁹⁷ See, e.g., *Wegener*, 527 F.3d at 693 (explaining that “supplemental testimony, though relevant, was not that important to [plaintiff]’s case because it was offered to prove a point in support of which a substantial amount of other evidence was presented to the jury”).

⁹⁸ See *Vanderberg*, 906 F.3d at 704–05.

⁹⁹ St. Jude argued “that Niazi’s induced infringement claim was deficient because Niazi ‘failed to identify a single instance of direct infringement underlying its assertion of indirect infringement.’” *Niazi*, 30 F.4th at 1354.

¹⁰⁰ See *MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 10 F.4th 1358, 1370–73 (Fed. Cir. 2021) (analyzing a district court’s ruling to exclude evidence under Rule 37 by looking to the law of the regional circuit); see also *Askan v. FARO*

reversal of the district court's indefiniteness ruling, giving Niazi another chance to prove infringement.

To be sure, even if Niazi had identified a cognizable legal or factual error on the exclusion issue, along with resulting prejudice, that would not equate with an automatic win on its infringement claim. But it would have earned Niazi a remand; in other words, Niazi would have lived to fight another day, bringing with it evidence of direct infringement. And another day in the world of patent litigation is priceless.

Techs., Inc., 809 F. App'x 880, 884 (Fed. Cir. 2020) ("We apply regional circuit law when we review a district court's decision to sanction a litigant pursuant to Federal Rule of Civil Procedure 37.").

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Judge Pitts:

I am writing to apply for the position as your term law clerk for the 2023-2024 term. I have recently graduated from Tulane University School of Law where I served as the Senior Articles Editor for the Tulane Journal of Law & Sexuality and an Administrative Justice of the Tulane Moot Court program. This summer I will be taking the Uniform Bar Exam in New York.

I have developed excellent legal research and writing skills through my prior work experience and studies at Tulane. I worked as a student attorney with Civil Rights & Federal Practice Clinic. Working with the clinic, I oversaw my own cases from client consultation, to researching novel client issues, to presenting my clients cases before a federal magistrate judge and the Louisiana Parole Board. I have held a deep commitment to working in and with federal courts for many years and working with the clinic has given me valuable litigation experience.

Additionally, at Tulane, I have honed my research and oral advocacy abilities by participating twice in the International Criminal Court Moot Court Competition in which my team was responsible for drafting three legal briefs on various matters of international criminal law. Through my dedication, hard work, and performance in moot court I was inducted into the Order of the Barristers. As a member of a journal my research has pertained largely to Fourteenth and First Amendment issues. My coursework at Tulane primarily focused on Constitutional law subjects concerning civil rights, administrative law, and criminal law. It is my hope that experience working as your clerk will allow me to apply the knowledge I have gained and continue to improve as a young lawyer. After completing this position, I intend to transfer my skills into a career in public interest focusing on the advancement and protection of LGBTQ+ rights.

With my skills and background, I believe that I am well qualified to serve as your law clerk. I look forward to speaking with you more about my qualifications and have attached my resume, writing sample, and current transcript. Further, the following are willing to serve as references to my work and character: Lucia Blacksher Ranier (504.862.8892) and Sam Brandao (504-865-5153), both supervising attorneys of the Tulane Civil Rights & Federal Practice Clinic, and Rose Murray (318.314.0147), my supervisor at the Southern Poverty Law Center. If you have any additional questions, I can be reached at tbauguess@tulane.edu or 910.526.7979. Thank you for your time and consideration.

Sincerely,

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- Conducted legal research for civil litigation matters including fair housing violations and employment discrimination; drafted legal memorandums, motions for summary judgment, and settlement position papers; engaged in settlement agreements and negotiations.

Project Ishmael • New Orleans, LA

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- Drafted motions and orders to be filed in juvenile court; researched issues relating to immigration removal orders; assisted lead attorney in preparing documents to file with the United States Citizenship and Immigration Services.

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Professional Experience Continued

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- Conducted client interviews often with the assistance of translators for immigrant clients from African and Latin American countries; conducted legal research for supervising attorneys concerning specific court filing deadlines, questions concerning habeas petitions, and procedures for filing motions to enforce judicial decisions; and drafted various motions to be submitted to the court and immigration agencies.

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Legal Intern • September 2021 • Drafted letters for waiver of inadmissibility for immigrant clients; organized client files; and compiled exhibits concerning client financial, medical, and personal information as well as country conditions for submission to the court and to the United States Citizenship and Immigration Services.

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1LAW-1110	Contracts I	B	3.00	9.00					
1LAW-1510	Torts	A-	4.00	14.68					
EHRS QHRS QPTS GPA CURRENT: 13.0 13.0 42.34 3.257 CUMULATIVE: 13.0 13.0 42.34 3.257									
2021 Spring									
1LAW-1080	Constitutional Law 1	B+	4.00	13.32					
1LAW-1160	Contracts II	A-	3.00	11.01					
1LAW-1210	Criminal Law	B	3.00	9.00					
1LAW-1410	Legal Research & Writing	B+	2.00	6.66					
1LAW-1360	Common Law Property	B+	4.00	13.32					
RANK CLASS SIZE Law Cum Rank 108 212 EHRS QHRS QPTS GPA CURRENT: 16.0 16.0 53.31 3.332 CUMULATIVE: 29.0 29.0 95.65 3.298									

* NOT APPLIED TO CURRENT PROGRAM
++ INCLUDES INITIAL STATISTICS

Page 1 of 2
5/29/2023

PROFESSIONAL ACADEMIC RECORD

NAME: Bauguess, Tabitha C.
 STUDENT ID: 133007377
 BIRTH DAY: March 3

ADVISING COPY

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COURSE NUMBER	COURSE TITLE	GRADE	HOURS (ATTEMPTED) EARNED	QUALITY POINTS	COURSE NUMBER	COURSE TITLE	GRADE	HOURS (ATTEMPTED) EARNED	QUALITY POINTS
2022 Fall									
NCLS-9050	Law & Sexuality Jrnl Sr Member	IP	(0.00)						
NCLS-9020	Moot Court Admin Justice	P	1.00						
CLIN-5100	Federal Pretrial Practice Sem	A+	3.00	12.00					
CLIN-5110	Civil Rights & Fed Prac Clinic	A	3.00	12.00					
CLIN-5550	Trial Advocacy	P	3.00						
4LAW-4040	Advanced Persuasive Writing	B+	2.00	6.66					
4LAW-4080	Advanced Appellate Advocacy	A	2.00	8.00					
4LAW-4550	Con Law:14th Amendment	A	3.00	12.00					
Law Term Rank		RANK	CLASS SIZE						
Law Cum Rank		39	196						
		84	196						
	EHRs	QHRS	QPTS	GPA					
CURRENT:	17.0	13.0	50.66	3.897					
CUMULATIVE:	76.0	67.0	235.27	3.511					
2023 Spring									
NCLS-9050	Law & Sexuality Jrnl Sr Member	P	1.00						
CLIN-5110	Civil Rights & Fed Prac Clinic	A	3.00	12.00					
3LAW-3660	Legal Writing for Lay Audience	A	3.00	12.00					
3LAW-3350	Trusts & Estates	P	3.00						
3LAW-3460	Employment Law	B	3.00	9.00					
NCLS-9020	Moot Court Admin Justice	P	1.00						
Law Year Rank		RANK	CLASS SIZE						
		45	204						
	EHRs	QHRS	QPTS	GPA					
CURRENT:	14.0	9.0	33.00	3.667					
CUMULATIVE:	90.0	76.0	268.27	3.530					
DEGREE REQUIREMENTS COMPLETED FOR									
Juris Doctor									
** 51 Community Service Hours Completed **									
** END OF PROFESSIONAL RECORD **									

* NOT APPLIED TO CURRENT PROGRAM

++ INCLUDES INITIAL STATISTICS

Page 2 of 2

5/29/2023

PROFESSIONAL ACADEMIC RECORD

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to recommend Tabitha Bauguess as a law clerk.

I have known Tabitha since January 2023 when she became a student in Legal Writing for a Lay Audience, my Tulane Law School seminar that teaches the fundamentals of effective and accessible communication about legal subjects. Having Tabitha in this intensive writing course was a delight; she showed exceptional talent for conveying legal ideas in clear and concise ways. Despite starting out as a strong writer, Tabitha was receptive to my critiques and suggestions, and her final drafts of assignments exhibited a willingness to learn and adapt. Tabitha was also an active participant in class discussions and her peer edits showed insight, depth, and an ability to tactfully convey criticism and praise.

While meeting the tight deadlines of my course, Tabitha remained highly engaged with extracurriculars at Tulane. She served as the Administrative Justice for the Tulane Moot Court Program, a program run entirely by student board members. She was also a member of Tulane Journal of Law & Sexuality where she served as the Senior Articles Editor. The journal is the first of its kind to publish legal scholarship dedicated to areas of law affecting LGBTQ+ individuals. Tabitha took on both of these roles while also working as a student attorney in the Civil Rights & Federal Practice clinic, one that provides free legal assistance to those in need during all phases of litigation.

Tabitha dedicated her time at Tulane to becoming an integral part of the Tulane community and I am certain that her drive and enthusiasm would serve her well as a law clerk. With regard to her personal characteristics, Tabitha is incredibly passionate about the law, outgoing and friendly. I know that others at the law school also think very highly of her. For all these reasons, I confidently recommend her.

Sincerely,

/s/

Amy Gajda
The Class of 1937 Professor of Law
Tulane Law School

Amy Gajda - gajda@tulane.edu - 504.862.3527



May 2, 2022

Working for Racial Justice
in the South

Southern Poverty Law Center
201 St. Charles Avenue
Suite 2000
New Orleans, LA 70170
504.486.8982
www.splcenter.org

Dear Hiring Manager:

This letter serves to provide my unequivocal recommendation of Ms. Tabitha Bauguess, who was an extern under my supervision in the spring term of 2022.

Our program within the Southern Poverty Law Center (SPLC) is the Southeast Immigrant Freedom Initiative (SIFI), which works to provide free legal representation to detained immigrants seeking release from detention centers across Georgia, Louisiana, Mississippi and Alabama. Also, SIFI trains volunteer attorneys to represent individuals facing deportation proceedings and partners with community organizations to advocate for immigrants' rights.

During her time with us, Tabitha was trained and mentored in trauma-informed advocacy techniques, which she deftly put into practice working with numerous of our clients, particularly one survivor of intense trauma with PTSD and mental health diagnoses, who struggles to communicate after a significant head injury. Tabitha kindly and firmly progressed through a series of very comprehensive interviews, which were challenging due to interpretation and comprehension and communication issues on the part of the client – and Tabitha also researched country conditions in order to help him prepare and file his asylum application, during which she often checked in for guidance and feedback, which made the application as strong as it could be. Tabitha also did great work for a number of other clients, including reviewing guidance and drafting a prosecutorial discretion memo; drafting requests for medical release; researching cases, key facts, and reports for inclusion in habeas filings; assisting with new client intakes and screenings; and FOIA requests.

Tabitha is an intelligent, motivated, compassionate, hard-working, and curious young advocate who always shows up prepared, with a growth/learning mindset, and on top of all of these assets, she is a great communicator. I could always count on her to be there for us on top of her busy coursework and other commitments at Tulane, and her work product was excellent. I was particularly impressed by her ability to parse out complex and new tasks, ask follow-up questions to discern additional information needed to complete them, and how she was always eager to do more and learn more. I heard nothing but great things from other colleagues with whom she worked, one who notes, "She was professional and detail-oriented. I was impressed by her writing and her questions about different aspects of the bonds and the assignment." Tabitha would be a valuable asset to your team – please do not hesitate to contact me should any further information be needed.

Sincerely,

Rose Murray (she/her)

Direct Services Attorney | Southeast Immigrant Freedom Initiative, Louisiana

Southern Poverty Law Center

Help Line 229.838.6500 Cell 318.314.0147 Fax 706.243.4932

rose.murray@splcenter.org | www.splcenter.org

Admitted in Louisiana

[Writing sample is excerpted from brief written for Advanced Appellate Advocacy course at Tulane University School of Law during the fall 2022 semester. All mentioned parties are fictional for the purpose of this exercise. This brief has received no editing from others.]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether the overly broad provision of Beau Monde's noncompetition agreement concerning the businesses engaged in by Janice Pace violates Louisiana law and is generally unenforceable because similar business is not defined. The answer is: yes.
- II. Whether the overly broad provision is severable, and the noncompetition agreement is otherwise enforceable. The answer is: no.

ARGUMENT

This Court should reverse the decision by the district court to enforce the Non-Compete Agreement between Ms. Roy and Beau Monde and dissolve the injunction against Ms. Roy. First, the language of the noncompete is overly broad in opposition to the requirements under Louisiana law. La. R.S. 23:921(C). Louisiana's Code Provision provides that noncompete agreements are unenforceable except for when they meet certain exceptions, including that they 1) be limited to a two-year maximum period; 2) are limited to businesses similar to that of the employer; and 3) they must be specifically limited in geographical scope. *Id.* Further, the Louisiana statute should be strictly construed and should be interpreted in favor of the employee. *LaFourche Speech & Language Services, Inc. v. Juckett*, 94-1809 (La. App. 1 Cir. 3/3/95), 652 So.2d 679, 680. The non-compete in question does not meet these requirements as the plaintiff, Beau Monde, failed to limit the noncompetition agreement sufficiently to satisfy the statute. R. at 10.

Second, the questionable nature of the plaintiff's noncompetition provision lends to its non-enforceability as a matter of public policy. It is well established fact that Louisiana courts disfavor noncompetition agreements as a matter of public policy. *SWAT*, 808 So.2d at 254. This

distaste stems from a desire to prevent employees from unwittingly contracting away their ability to make a living and provide for themselves. *Id.* Otherwise, would risk unsophisticated contractors from being forced to become a public burden. *Id.*

As this case involves a question of legal construction and requires this court to make independent review of the specific Agreement, the applicable standard of review is de novo. *New Orleans Jazz and Heritage Foundation, Inc., v. Kirksey*, 2009-1433, (La. App. 4 Cir. 5/26/10), 40 So.3d 394, 401.

I. The Noncompete Provision Defining “Similar Business” is Overbroad and Unenforceable.

The language of the non-compete proffered by Beau Monde is overly broad and thus renders the contract unenforceable. 2019-0813 (La. App. 4 Cir. 3/11/20). Louisiana law provides that non-competition agreements are unenforceable unless they meet special requirements of Louisiana statute. La. R.S. 23:921(C). The provision in question satisfies the two-year maximum statutory requirements. R. at 28. However, it fails to restrict solely to similar businesses and the “any other business” of Janice Pace provision also does not place sufficient restrictions on geographical limitations.

Louisiana law does not explicitly require specificity, however Louisiana courts disfavor noncompetition agreements that overextend restrictions on employees. *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 00-1695 (La.6/29/01), 808 So. 2d 294, 298.

In this case, the plaintiff sought to enforce a provision that would prevent Ms. Roy from being able to work in any capacity within her chosen profession. Because the reach of the noncompete agreement extends beyond the parties’ intentions and over burdens Ms. Roy’s future employment opportunities, the provision should be removed from the contract.

In *Paradigm Health System, L.L.C., v. Faust*, the plaintiff sought to enforce a noncompete against a doctor hired to perform pain management services. 2016-1276 (La. App. 1 Cir. 4/12/17), 218 So. 3d 1068. The language of the noncompete prevented the defendant from “engag[ing] in the practice of medicine or render[ing] ant medical services to any business similar” to those provided by the plaintiff. The court held that this language was overbroad as it restricted the defendant without limitation and would prevent the defendant from working in a variety of medical fields beyond the scope of his employment with the plaintiff. *Id.* at 1075.

Further, while many circuits courts in Louisiana have recently held that noncompete agreements to do not to be written with specific definition of similar business to adhere to La. R.S. 23:921(C), in *Daiquiri’s III on Bourbon, LTD., v. Wandfluh*, the Fifth Circuit did render a noncompete provision unenforceable due to its lack of specificity. 608 So. 2d 222, 224-25 (La. App. 5th Cir. 1992). Here the court noted that noncompetition agreements must be “strictly construed in the employee’s favor.” *Id.* (quoting *Jon Bet & Associates v. Tyer*, 550 So.2d 673, 675 (2nd Cir.1989)). The court held that the lack of specificity in the noncompetition agreement was overbroad because it would prevent the defendant from working in businesses even remotely similar, but noncompetitive, to the plaintiff’s business. *Id.* at 225. *See also LaFourche Speech*, 652 So.2d at 681 (holding that the noncompetition agreement was overbroad because its lack of specificity meant that the defendant was restricted from working in any field that the plaintiff engaged in even though she was only hired for specific services); *Summit Institute for Pulmonary Medicine and Rehabilitation, Inc. v. Prouty*, 29,829 (La. App. 2 Cir. 4/9/97), 691 So.2d 1384 (holding that a noncompetition agreement was null where it restricted an employee from engaging in work with a similar businesses).

While these cases differ in that they pertain specifically to employees who left to work for other pre-existing competitive businesses, the application should extend to any noncompetition agreement which restricts an employee from working for another regardless of their actual subsequent employment. The noncompetition agreement in this case is overbroad in that it does not only prevent Ms. Roy from operating her own salon and spa, but it would also prevent her from working in the salon of another employer.

In *Paradigm*, the Agreement stated a limitation on the defendant's ability to "practice medicine" beyond the scope of employment he was hired for. 218 So. 3d at 1074. The plaintiff argued that this language was limited by the following provision that contained "similar business" language and that the doctor understood the noncompete provision to refer to pain management services. *Id.* at 1073. Here the trial court found, and appellate court agreed, that no portion of the agreement defined the plaintiff's business. *Id.* at 1076.

In *Environmental Safety & Health Consulting Services, Inc. ("EHS"), v. Fowler*, EHS sought to enforce a noncompete agreement against the defendants where defendants had left EHS employ for a competitor after EHS dismissed them from employment. In this case, the Fourth Circuit Court of Appeal of Louisiana held that the injunction against the defendant's was enforceable under La. R.S. 23:921(C) because the Agreement contained specific language prohibiting the defendants from working in the transportation and disposal of waste. The court further states that this definition was not inclusive of all types of waste transport and disposal and was limited to certain types of waste and containment. However, in this case the defendants had worked for the plaintiff for several years *prior* to entering the Agreement and could testify to the work performed by the plaintiff and could readily distinguish what businesses would be competitive.

This case is distinguishable as Ms. Roy was not similarly situated to the defendants in *Fowler*. Ms. Roy had not previously worked for Beau Monde or Ms. Pace prior to entering the Agreement. R. at 13. In her case, Ms. Roy did not have adequate time to become familiar with all aspects that Beau Monde may invent as similar, competitive, businesses or other businesses that Ms. Pace engaged in before entering into her contract. In fact, working for Beau Monde was Ms. Roy's first time being employed in the salon industry. R. at 13.

a. The Non-Solicitation clause if the Agreement further fails to meet the statutory requirement of geographical restriction.

The non-solicitation provision of the agreement is also unenforceable as a matter of law. Non-solicitation agreements are treated separate from non-competition agreements; however, they must still conform to the requirements of La. R.S. 23:921 and its exceptions. *Vartech Sys., Inc. v. Hayden*, 05-2499 (La. App. 1st Cir. 12/20/06), 951 So. 2d 247, 260. In the present case, the provision of the Agreement pertaining to a prohibition on solicitation is invalid because it does not contain a geographical restriction as required by statute. La. R.S. 23:921(c). The injunction against Ms. Roy should be dissolved because the contract is unenforceable.

In *Vartech Sys., Inc. v. Hayden*, the court upheld the noncompetition clause of a contract because the contract contained a savings clause, however struck the portion of the contract restricting solicitation because the provision was not limited in geographical scope. 951 So.2d at 260-61. The court further stated the ability to infer geographical limitation was insufficient to preserve the provision as the clause "must be able to stand on its own." *Id.* See also *Kimball v. Anesthesia Specialists of Baton Rouge, Inc.*, 00-1954 (La. App. 1st Cir.9/28/01), 809 So.2d 405, 412 (holding the same). Further, in *Vartech* the court held that the noncompetition agreement was reformable because it contained a savings clause. *Id.* No such clause was present, however, in the non-solicitation provision. *Id.* at 260.

In the present case, the non-solicitation provision cannot stand on its own. The non-solicitation provision is not limited in geographical scope and thus prevents Ms. Roy from soliciting business outside of the parishes the plaintiff operates within. R. at 10. Following the decisions of the First Circuit the non-solicitation agreement must be rendered unenforceable. *Vartech*, 951 So.2d at 260-61; *Kimball*, 809 So.2d at 412. Like the cited cases, the Agreement entered by Ms. Roy and the plaintiff does not contain a severability or savings clause for this provision which could allow the court to reform the contract to be in compliance with the statute. *Id.* Because the contract contravenes state law and cannot be reformed, the contract should be a nullity.

II. The Offending Provision is Not Severable, and the Agreement is Null and Void as a Matter of Statutory Interpretation.

Because the Agreement does not adhere to statutory requirement, the next question before the Court is whether the unenforceable provisions may be severed from the contract and be otherwise enforces. The circuits are split over the answer to this question. Under the Louisiana Civil Code: “nullity of a provision does not render the whole contract null unless, from the nature of the provision or the intentions of the parties, it can be presumed that the contract would not have been made without the null provision.” La. Civ. Code art. 2034. In the Third and Fifth Circuits, the language of an otherwise unenforceable provision cannot be modified and remain in the contract unless the contract contains a severability clause. *See J & S Res. LLC. V. R-4, LLC.*, 10-1524 (La. App. 3d Cir. 5/4/11), 63 So.3d 393; *Herff Jones Inc. v. Girouard*, 07-393 (La. App. 3d Cir. 10/3/07), 966 So.2d 1127; *CBD Docusource, Inc. v. Franks*, 06-167 (La. App. 5 Cir. 6/28/06), 934 So.2d 307; *Advanced Medical Rehab, LLC. V. Manton*, 2022 WL 533885, 21-315 (La. App. 5 Cir. 2/23/22), _So.3d_.

The District Court, however, relied on *Causin, LLC v. Pace Safety Consultants, LLC* in rendering its decision that the provision was severable. R. at 29-30; 2019 WL385206, 2018-0706 (La. App. 4 Cir. 1/30/19) _ So. 3d _. The district court's reliance on *Causin* was misplaced as *Causin* does not directly address the issue of severability. 2019 WL385206 at *17. As such this Court should reverse the decision and apply the Third and Fifth Circuit's interpretation of Code art. 2034.

First, the court's reliance on *Causin* is misplaced. In reaching its opinion the Fourth Circuit held that the noncompetition agreement met all three requirements under La. R.S. 23:921(C). *Id.* at *15. The court, from this disposition, declined to review the issue of severability because the clause was not used by the Court, or even the district court, to render its judgment. *Id.* at *17. This case is further distinguishable from the present case because the question of severability in the absence of a severability clause was never at issue. In *Causin*, the contract contained a severability clause, but the defendant argued that it was ambiguous. *Id.* at *7. Because this case does not stand for the principle asserted by the district court nor is it on point, the decision of the district court should be reversed in favor of the defendant and more applicable case law.

Instead, the jurisprudence from the Third and Fifth Circuits is much more informative to this case. For example, in *CBD Docusource, Inc. v. Franks*, the Fifth Circuit held that as a matter of statutory interpretation La. R.S. 23:921 did not allow for severability of a provision in a noncompetition agreement where the entire contract was the noncompetition agreement and lacked a specific severability clause. 934 So.2d at 311. The court instead stated that the allowance of severability under statute was designed for broader contracts where the noncompetition provision is just one of many. *Id.*

In *J & S Res., LLC. v. R-4, LLC*, the Third Circuit held that the trial court was correct in denying the plaintiff relief from an employee in supposed breach of a noncompetition agreement. 63 So.3d at 396. Here the noncompetition agreement contained an admitted overly broad provision, but the plaintiff still sought for the court to amend the contract to make it enforceable. *Id.* at 394. The court declined to do so largely on public policy concerns and limitations on how much courts should interfere with unfavorable contracts. *Id.* (quoting *Gearheard v. DePuy Orthopedics, Inc.*, 1999 WL 638582, at *6, (E.D.La. Aug. 19, 1999)).

Further, the district court incorrectly asserted that *SWAT* was inapplicable to this case. R. at 30. This is also an error. While *SWAT* did involve an interpretation of noncompetition agreement that did contain a severability clause, the court's dicta, and its progeny, speculating on the absence of such a clause is informative. In *SWAT*, the Supreme Court of Louisiana held that "in light of" the severability clause that the court would sever the null clause. 808 So.2d at 309. This language implies that had the clause not been present the court may have been unable to sever the offending provision. The court went on to further state they would not rule in more depth due to uncertainty created by the circuit split. *Id.* The jurisprudence has continued to evolve over the last twenty-one years and is time that this issue be harmonized.

The progeny from *SWAT* would imply to correct direction of the jurisprudence favors not imposing severability where none is contractually proscribed. For example, in *Herff Jones, Inc. v. Girourd*, held that the contract was not unenforceable due to a null provision *because* the contract contained a severability clause. 966 So.2d at 1135. More recently, in *Advanced Medical Rehab, LLC v. Manton*, the Fifth Circuit recognized that holding in *SWAT* depended on the specific terms that were included in the severability clause. 2022 WL533885 at *11. The court in *Manton* declined to sever the offending clause even in light of a severability clause which it

viewed as deficient along with the noncompetition agreement as a whole. *Id.* at *20. The court further declined to apply the severability clause because to do so would require the court to rewrite the provision to make it comply with La. R.S. 23:921(C). *Id.*

It follows that the offending provision in Beau Monde's contract is not severable. In this case, the contract signed by Ms. Roy and Beau Monde was exclusively a noncompetition agreement and not part of a larger employment contract. R. at 11. This is analogous to the noncompetition agreement at issue in *CBD Docusource* where the offending provision was not severable because there was no specific severability clause. 934 So.2d at 311. Because the Agreement in question lacks a specifically applicable severability clause the offending provision is not severable, and the entire contract should be interpreted as null under La. R.S. 23:921(C).

Further, under public policy considerations neither the trial court nor this Court should invent severability where there is none. To do so would undermine the legislature's intent in enacting La. R.S. 23:921 to protect employees from contracting themselves out of alternative employment and risk them becoming public burdens. A holding that the contract in its entirety is null is also consistent with principles established by the state's Supreme Court and two of its appellate circuits. *See SWAT*, 808 So.2d at 309; *J & S*, 63 So.3d at 396; *Manton*, 2022 WL53385 at *11-21. In this case severing the offending, overly broad provision would require the Court stepping in to rewrite the entire contract to be in line with state statute. This is an overstep by the Court and does not conform to the spirit and intent of La. R.S. 23:921. *Id.*

Because the case relied upon by the trial court is inapplicable to this case and the overwhelming jurisprudence from other of Louisiana's courts dictate that the provision should not be severable and the contract be null, this Court should reverse the finding of the district court and dissolve the injunction against Ms. Roy.

Content-Based Restrictions vs. Harassment Protections for Transgender Individuals: A Look at
Taking Offense v. State and the Future of Anti-Harassment Laws

I. OVERVIEW

Transgender discrimination is so common in long-term care facilities that many individuals who identify as transgender do not seek care from such facilities.¹ To combat these conditions, the California legislature passed Senate Bill No. 219 (SB 219), which, in relevant part, prohibited employees of long-term care facilities from intentionally misgendering transgender residents.²

Taking Offense, an “unincorporated association that includes at least one California citizen and taxpayer who has paid taxes...[in] the last year,” brought suit seeking a writ of mandate challenging both provisions of SB 219.³ Taking Offense argued that the pronoun provision of the bill was a violation of employees right to free speech as protected by the First Amendment, among other claims,⁴ and that the room assignment provision was an equal protection violation.⁵ The trial court issued a decision dismissing the petition in its entirety.⁶ Taking Offense then appealed. The California Court of Appeals for the Third District held that the pronoun provision was unconstitutional as it amounted a content-based restriction on free speech, but that room assignment provision did not violate equal protection or non-transgender residents’ rights to intimate association. Taking Offense v. State, 281 Cal. Rptr.3d 298 (Cal. App. 3d Dist. 2021).

II. BACKGROUND

A. First Amendment

The First Amendment prevents the government from imposing restrictions on the freedom of speech.⁷ The equal protection clause of the Fourteenth Amendment mandates that the State shall not deny anyone equal protection under the law.⁸ But what are the limitations of these guarantees? Does the First Amendment grant the ability to speak and cause harm to protected classes without incurring repercussions? Emerging legal jurisprudence has largely answered yes.⁹ Regulations on free speech must be done with the utmost caution. However, legal jurisprudence has a long history of justifiable restrictions pertaining to speech that causes severe harm¹⁰ and when regulations serve to limit the time or place of that speech.¹¹

The principles of the First Amendment are often lauded as the greatest protections guaranteed to American citizens. We are free to express our joys and our disdains in the great marketplace of ideas.¹² The marketplace is meant to facilitate a space where we can express and receive ideas so that we may learn from them and complete our own analysis of what information is good or bad, truer fraudulent, without the heavy hand of the government imposing its will on citizens.¹³ The ability of citizens to express themselves freely is a pinnacle of a free society. However, even given these important goals, the First Amendment has never been interpreted to give an absolute right to free speech.¹⁴ If the right to free speech is limited, then the issue becomes when is speech permissible and impermissible? The courts have not provided a clear answer.

i. Content-Based or Facially Neutral Restrictions and Applicable Scrutiny

Restrictions on speech hinge upon the determination of if the law is content-based—restricted ideologies or messages on a particular subject—or content-neutral—restricted based on a non-content ground.¹⁵ The issue arises in determining what qualifies as a content-based

restriction. Historically two approaches arose to deal this question: an absolutist view that any consideration of content automatically failed a neutrality analysis, thus triggering strict scrutiny, and a practical view that considered if the content restriction treated certain types of content differently than others.¹⁶ Under the practical view, the analysis shifts to intermediate scrutiny and whether the law regulates “time, place, and manner” and considers other means of communicating the regulated ideas.¹⁷ The Supreme Court supposedly settled this question when deciding Reed v. Town of Gilbert, a Ninth Circuit case in which the town of Gilbert, Arizona adopted a code that categorized content of temporary sign placement within town limits and sought to regulate, in particular, signs posted to direct the public towards meetings held by nonprofit groups.¹⁸ Justice Thomas, writing for the majority, stated that where a law is facially content-based, then it is “subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained.’”¹⁹ After Reed, any law which seeks to regulate content-based speech incurs an automatic strict scrutiny analysis to determine if it is violative of the First Amendment.

The Supreme Court advanced two theories as to why strict scrutiny is necessary in these cases. First, strict scrutiny is necessary to prevent restrictions on the “marketplace of ideas.”²⁰ Second, heightened scrutiny is necessary to prevent the government from creating laws that express “hostility” or “favoritism” of the regulated idea or message.²¹ However, when a law is subject to strict scrutiny, it is almost guaranteed that the law will be struck down.²² This concern was voiced by Justice Kagan in her concurrence to Reed.²³ While her dissent focus on the inconsequential effects strict scrutiny may impose on content-based restrictions that do not impede the marketplace of ideas, the question remains what is to be done about issues that contribute little to a public conversation or only seek to cause social harm?